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THE
ONTARIO REPORTS,
VOLUME XXIX.
CONTAINING
REPORTS OF CASES DECIDED
IN THE
HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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ERRATA.

Page 262, line 7 from bottom, for "175 Mass." read "125 Mass."

Page 437, line 6 from bottom, for "not" read "well."

Page 599, line 5, for "ARMOUR, C. J.," read "MEREDITH, C. J."

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

VIDEAN ET AL. V. WESTOVER.

Life Insurance—Benefit Certificate—"Ordinary Beneficiary"—Reapportionment by Will—Validity—60 Vict. ch. 36, secs. 151, 159, 160 (O.)—Retroactivity—Appeal—Waiver.

A life insurance certificate on its face made the sum of \$500 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred, before the passing of 60 Vict. ch. 36 (O.):—

Held, that secs. 151, 159, and 160 of that Act applied to the certificate and declaration made by the will, and by those sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary" and the reapportionment made by the will was valid.

Right of appeal waived by acting on judgment.

THIS was an issue as to the disposition of certain insurance moneys, tried before FERGUSON, J., without a jury, at Sarnia, on the 22nd November, 1897. The facts are stated in the judgment. Statement.

C. J. Holman and H. J. Dawson, for the plaintiffs.
Tremear, for the defendant.

December 13, 1897. FERGUSON, J.:—

According to the frame of the issue, the question is whether the defendant, Hattie Westover, is, or the plaintiffs, the executors of the last will of the late George Videan, are, entitled to the sum of \$500 in Court to the credit of a certain matter of a certificate of membership, number 12,298, issued to George Videan (since deceased) by the Provincial Provident Institution, for \$3,000, dated the 7th May, 1894, and in the matter of the Trustees'

Judgment. Relief Acts, 10 & 11 Vict. ch. 96 (Imperial), the said \$500 being part of the insurance on the life of the since deceased George Videan under the said certificate.

The certificate on its face makes this sum of \$500 payable to Hattie Videan, then the daughter-in-law of the assured, George Videan; and if no change had taken place as to this till the death of George Videan, there seems no doubt that Hattie Videan, who is now the above named defendant, would have been entitled to the money.

After the issuing of the certificate the son of George Videan, who was the husband of Hattie Videan, died, and his widow, Hattie Videan, married Westover. She is now claiming the money under the name Hattie Westover.

After her marriage with Westover, and before his death, George Videan, the assured, made and published his last will, whereby he changed, or professed to change, or rather to make changes in respect to, the beneficiaries under the certificate and the amounts of the insurance they should receive or be entitled to, and according to such changes the defendant, Hattie Westover, is left out, and not a beneficiary at all, the whole sum, the \$3,000, being distributed amongst the beneficiaries named in the will.

The date of this will is the 20th day of January, 1897. The testator died a few days thereafter.

It was contended on behalf of the defendant, Hattie Westover, that the assured, George Videan, had not power by his will so to change the beneficiaries and the amounts to be received by them respectively as to deprive her (she being a daughter-in-law, and not the wife, a child, a grandchild, or the mother of the assured) wholly of the sum that, according to the terms of the original certificate, she was or would be entitled to receive.

It was contended on behalf of the plaintiffs, the executors of George Videan's will, that the testator had such power, and that they, as such executors, were entitled to receive the whole of the money, and are now entitled to be paid this \$500.

The defendant, Hattie Westover, set up another conten-

tion which was that she was a beneficiary for value or consideration, and that for this reason she could not be so deprived of this \$500. Judgment.
Ferguson, J.

In respect of this contention much and prolonged evidence was given. At the trial, however, I disposed of this matter by finding on the evidence against the defendant, giving shortly my reasons for so doing.

There remains to be disposed of now only the legal question, or what was at the trial called the legal question, arising on the contention firstly above mentioned.

In respect to this question counsel for the defendant contended that, prior to the passing of the Act 60 Vict. ch. 36, it was clear that this power did not exist, referring to 59 Vict. ch. 45, sec. 2, sub-sec. 1 (a section substituted for sec. 6 of ch. 136, R. S. O.), and sec. 5 of the same ch. 136, and the amendments thereof, and that 60 Vict. ch. 36 does not apply to the case, for the reason that the death of the assured took place before the coming into force of that Act.

For the plaintiffs it was contended that the Act 60 Vict. ch. 36 does apply to the case, and that, even if it did not, under the former law the assured had power to do by his will what he professed to do, namely, by a reapportionment to deprive this defendant of the benefit of this \$500, in favour of other beneficiaries.

If the Act 60 Vict. ch. 36 applies here, it is not needful to consider what was the effect, in respect of a case like the present one, of the prior enactments or law.

It was scarcely, if at all, disputed that if the Act 60 Vict. ch. 36 applies to the case, the testator had the power to do as he professed to do by his will. The sections of the Act that seem of the most importance (if the Act applies) are secs. 151, 159, and 160, and in each one of these sections (as also other sections of the Act) there is a sub-section declaring that: "This section applies not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made."

Judgment. Section 156 was also referred to and relied on by the defendant. This section relates chiefly, if not altogether, to cases of the death of the assured abroad and payment to foreign representatives; and sub-sec. 6 declares: "This section applies to policies heretofore issued as well as to policies to be issued hereafter, and whether the death has occurred before the passing of this Act or not."

Ferguson, J.

It was contended that, inasmuch as the provisions in respect to the application of secs. 151, 159, and 160 do not contain this last clause (whether the death occurred before or after the passing of the Act), it is to be presumed and inferred that the declarations as above in respect to the application of each of these three sections is to be limited and confined to cases in which the assured did not die till after the passing of the Act.

Section 156 seems to contain no provisions in any way respecting apportionment or reapportionment of benefits. Its enactments are on subjects quite different from the subjects of the other three sections above mentioned. It may have been deemed essential and expedient, when dealing with the subject of the death abroad of the assured and the payment of the money to his foreign representatives, to introduce this last clause as to the time of the death; and, taking the clause in the setting in which it is found, it does not appear to me to constitute a ground sufficient to enable one to draw an inference against what I cannot but consider plain language of the other provisions, those relating to the application of secs. 151, 159, and 160, respectively, each of which says that the section applies to any contract of insurance theretofore issued and declaration theretofore made. This, as I think, includes all insurance contracts theretofore issued and all declarations theretofore made; and I am of the opinion that the provisions of these three sections, 151, 159, and 160, apply, so far as in their nature they are applicable, to the present policy and declaration. And, assuming this to be so, the testator had power to do as he professed to do by his will.

Sub-section 2 of sec. 159 defines "preferred beneficiaries." Judgment.
They are the husband, wife, children, grand-children, and the mother of the assured, and it says that all other beneficiaries may be known as "ordinary beneficiaries." The defendant was an "ordinary beneficiary." Ferguson, J.

Sub-section 1 of sec. 151 authorizes an insurance for the benefit of any person or persons whomsoever, and whether or not the beneficiary or beneficiaries has or have an insurable interest in the life of the assured.

Sub-section 3 of sec. 151 authorizes a reapportionment or an alteration or revocation of the benefits or trusts, or the addition or substitution of new beneficiaries, or the diversion of the insurance money wholly or in part to the assured himself or his estate, by an instrument in writing attached, etc., etc.; but provides that the assured shall not revoke or divert the benefit of any person who is a beneficiary for value, and that the assured shall not divert the benefit of a person who is of the class of "preferred beneficiaries" to a person not of the said class, or to the assured himself, or to his estate. It seems to give and leave undisturbed the power to alter or revoke the benefit of an "ordinary beneficiary," which this defendant, as before stated, is.

The first sub-section of sec. 160 authorizes the assured to make or alter the apportionment of the insurance money by his will, and declares that an apportionment made or altered by his will shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will.

I am of the opinion that the reapportionment made by the will of the assured in the present case is valid and should stand. This deprives the defendant, who was an "ordinary beneficiary" only, of her benefit, and she is not, as I think, entitled to this \$500.

It was not disputed that if she is not entitled to it, the plaintiffs are, as executors, entitled to it.

The finding on the issue will be in the plaintiffs' favour

Judgment. There will be a finding and a judgment upon the issue
Ferguson, J. in favour of the plaintiffs, and they, as executors, are
 entitled to this sum of \$500 in Court.

The costs of the issue (of all parties) will be out of the fund. The executors will have trustees' costs.

[An appeal by the defendant from this decision was brought before a Divisional Court composed of **BOYD, C.**, and **MEREDITH, J.**, on the 10th February, 1898, but was quashed (following *International Wrecking Co. v. Lobb* (1887), 12 P. R. 207, and *Keith v. Keith* (1877), 25 Gr. 110) because the defendant was held to have waived his right of appeal by acting upon the judgment in obtaining his costs out of the fund in Court, which, with the plaintiffs' costs, also paid out, exhausted the fund.]

E. B. B.

FITCHETT V. MELLOW ET AL.

Way—Easement—Way of Necessity—Physical Inaccessibility—Convenience.

A way of necessity is founded on necessity, not on convenience, and the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

The defendants in an action for trespass to land set up that a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they claimed that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of utilization without an unreasonable expenditure of money, and not sufficient for the reasonable purposes of the owner of the lands:—

Held, that the defendants were not entitled to the right claimed by them.

Dictum of Lord Mansfield in *Morris v. Edgington* (1810), 3 Taunt. at p. 31, and of Bowen, L. J., in *Bayley v. Great Western R. W. Co.* (1884), 26 Ch. D. at p. 453, referred to.

Statement. THIS was an action for trespass to land tried before **MEREDITH, C. J.**, without a jury, at Napanee, on the 23rd November, 1897. The facts are stated in the judgment.

Clute, Q.C., and *U. M. Wilson*, for the plaintiff.

W. R. Riddell and *G. F. Ruttan*, for the defendants.

December 13, 1897. MEREDITH, C. J. :—

Judgment.

Meredith,
C.J.

The plaintiff, who is the owner of that part of lot 7 in the 2nd concession of the township of South Fredericksburgh which lies north of the main travelled road, brings this action to recover damages for an alleged trespass thereon by the defendants, which was committed by them in the assertion of a right of way over the plaintiff's lands, and for an injunction to restrain the continuance of the alleged acts of trespass.

The defendants, who own lot 9 in the 2nd concession of the same township, in their statement of defence set up that a portion of their land is disconnected and separated by water from the remainder of it (called the mainland), so that, as they allege, it is impossible to reach, use, occupy, or enjoy it without passing over the plaintiff's lot and lot 8, which lies between the lands of the plaintiff and the defendants, and the defendants justify the alleged acts of trespass as having been lawfully done in the exercise and enjoyment of a right of way over the plaintiff's lands, which is claimed either as a way of necessity or as having been acquired by prescription, and they counterclaim for a declaration of their alleged rights, and an injunction to restrain the plaintiff from interfering with them in the enjoyment of them.

I determined at the trial that the defendants had not made out their title to the right claimed by them, if the acquisition of it depended upon the Statute of Limitations, because, as I found upon the evidence, the enjoyment had not been as of right, but by the permission of the plaintiff and his predecessors in title, and not for the requisite period to entitle the defendants to claim by prescription, even if the enjoyment had been of right, and I reserved judgment on the other branch of the defendants' claim,—the right of way as a way of necessity.

Before considering the law applicable to the case, it will be well to point out the exact position of the defendants' land. The greater part of it is upon what is called in the

Judgment. statement of defence the mainland, and that part of it in
Meredith, respect of which the way of necessity is claimed consists
C.J. of the extremity of a narrow spur or peninsula which juts out into the waters of Hay bay, by which it is separated from the mainland, and the only access to it by land is over lot number 8, from which access to the mainland can be had either by passing across that lot to the main road, or from lot 8 to lot 7, and through the plaintiff's land to a lane or road running at right angles to the main road, and by that lane or road to the main road.

The greater part of lot number 8 and a large part of the east half of lot number 7, both of which parcels belong to one Lasher, consist of marsh land or swamp, and the making of a road through these parcels to the main road would on that account involve an expenditure of a considerable sum of money, and in any case the road would be difficult to make and maintain in a condition fit for hauling loaded waggons over, unless the marsh were susceptible of being drained, as to which no information is afforded by the evidence.

The part of lot number 9 forming the extremity of the point, and belonging to the defendants, is surrounded by water on all sides except the west, and access to it can be had in the winter season, when the waters of Hay bay are frozen, over the ice, and at other periods of the year by boat, though at present at certain seasons neither method of access is available, owing to the shallowness of the waters of the bay. What the conditions in this respect were when the lands were originally granted by the Crown, nearly a century ago, did not appear in evidence, though the knowledge one has as to the lowering of the waters of the lakes of which Hay bay forms part, would lead one to think that the difficulty of access by water cannot have been so great at the time the grants were made as it is now; and it is, I apprehend, the condition of the lands at that period upon which depends the question of the existence of a way of necessity; for I take it that if at that time the point was accessible from the mainland,

the fact that it had subsequently become less accessible, or entirely inaccessible, could not confer upon the owner of it such a right, which, from its nature and the reason for it, must have been acquired, if at all, at the time when the lands which would be affected by the existence of the way were granted by the then owner, the Crown, to the several patentees of it. The mainland and the point form together one lot, and as such were granted to the defendants' predecessors in title.

Judgment.
Meredith,
C.J.

The contention of the defendants is that a way of necessity for the purposes of so much of lot number 9 as is separated from the mainland, over lots numbers 7 and 8 to the lane or road, and thence to the main road, was impliedly reserved by the Crown when these lots were respectively granted, and that such a way is to be deemed to have been reserved, although the land in respect of which it is claimed is not entirely surrounded by the lands of the grantor or of other persons, and even though there are other means of access to it, if those means cannot be utilized without an unreasonable expenditure of money, or are not sufficient for the reasonable purposes of the owner of the lands, or, in other words, that the necessity for the means of access need not be a "physical" necessity, but that a "reasonable" necessity suffices, or, as put by Lord Mansfield in *Morris v. Edgington* (1810), 3 Taunt. at p. 31, "without which the most convenient and reasonable mode of enjoying the premises could not be had."

I have examined the cases cited by counsel, and other cases, and the conclusion to which I have come is that the contention of the defendants is not maintainable.

There are, no doubt, to be found dicta of eminent Judges which seem to favour the defendants' contention, of which the observations of Lord Mansfield to which I have referred (though they were scarcely even an *obiter dictum*) and the remarks of Lord Justice Bowen in *Bayley v. Great Western R. W. Co.* (1884), 26 Ch. D. at p. 453, are examples; but the reason of the thing and the weight of authority are, in my opinion, opposed to the contention of the defendants.

Judgment.
Meredith,
C.J.

The appellation given to this kind of way, "a way of necessity," indicates that it is founded on "necessity," not on "convenience," and some of the confusion which has arisen upon the authorities, if I may so speak of it, has, I think, occurred from failing to distinguish between a "way of necessity," properly so called, and *quasi*-easements which pass or are reserved under certain circumstances, where the reasonable enjoyment of the land with which they have been held to pass could not be had by the grantee if they did not pass with the land.

Examples of the latter class are to be found in such cases as *Bayley v. Great Western R. W. Co.* (1884), 26 Ch. D. 434, already referred to. In that case the defendants claimed that a right of way over a private road which their vendor had made over his land from a stable on it (the doors of which opened upon the road, and were the obvious means of access to it) to the highway passed by the conveyance by him to them of a part of the land upon which the stable was situate, although the soil of the road was not conveyed to the defendants, and the vendor had retained the remainder of the land through which the road passed, and although there existed means of access from the stable to another highway. The land was conveyed together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel, or member thereof."

Mr. Justice Chitty, before whom the action was tried, held that the right to the use of the road for the purposes of the stable passed by the conveyance to the defendants, and his decision was affirmed by the Court of Appeal.

Lord Justice Cotton, in delivering judgment, expressed the opinion (p. 447) that it could not be contested that as between an ordinary grantor and grantee of this stable (it was contended that the railway company as grantee had not the same rights as an ordinary grantee) there would have passed with the stable, on a conveyance of the stable, a right to use the "road which was a reasonable access to the stable, and which, as a matter of fact, had been enjoyed

with the stable as the means of access thereto:" and he added that "if the road had been the property of anyone else, and had been so enjoyed, it would have become an easement."

Judgment.
Meredith,
C.J.

Lord Justice Bowen was of opinion (p. 453) that the language of the conveyance shewed that "the grantor intended to give, and that the company should have, all such rights in the nature of rights of way as were *de facto* occupied or enjoyed at that time as appurtenant to the premises:" and he added: "It is quite true that this at the moment of the grant was not a right of way. It was only a way."

And Lord Justice Fry states (pp. 456-7) the general principle of construction laid down in *Watts v. Kelson* (1870), L. R. 6 Ch. 166, and *Kay v. Oxley* (1875), L. R. 10 Q. B. 360, in this way, "that if one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre."

Thomas v. Owen (1887), 20 Q. B. D. 225, was a somewhat similar case. The defendant claimed under a lease (made in 1873) from Sir Richard Bulkeley to him of Ty Wian farm, including the soil of a lane called Lon Car Glas, and contended that he held the lane free from all rights of way in favour of the plaintiff, who at the date of this lease was tenant from year to year, under the same landlord, of an adjoining farm called "Caerau."

The defendant claimed a right of way over Lon Car Glas; this lane was a made and fenced road, subsisting visibly for the convenience of the plaintiff's farm, and of no use as a road to the defendant; it was and had been openly used by the plaintiff and his predecessors in title for many years, and had been repaired by them.

Judgment.
Meredith,
C.J.

The plaintiff subsequently, in the year 1878, accepted a lease from his landlord of Ty Wian; by this lease the lessor demised to the plaintiff the messuage known as Ty Wian, together with all the land and all houses, buildings, and appurtenances thereto belonging, subject to reservations of timber, mines, and game, but the lease contained no other general words than the word "appurtenances."

The defendant contended that no right of way passed under the lease of 1878 to the plaintiff, that a way of which there had been a mere *de facto* enjoyment would not pass by the word "appurtenances," and that the plaintiff's lessor and the plaintiff claiming under him were estopped by the lease of 1873 from setting up any right of way over the defendant's farm.

In delivering the judgment of the Court, Lord Justice Fry, referring (p. 231) to the argument of the defendant's counsel that alike in implied reservations and in implied grants a rule existed to the effect that whilst such an implication might arise in the case of easements of necessity and continuous easements, it could not arise in the case of easements which were neither of necessity nor continuous, said that on that principle there had been engrafted an exception in the case of a formed road made over an alleged servient tenement to and for the use of the dominant tenement, and added that if the exception arose in the case of a grant, the Court thought it ought to arise in the case of a reservation made to support an earlier grant, as in that case, and, for those reasons, the Court determined that the lease of 1873 was according to its true construction subject to the right of way then existing in the plaintiff, and consequently that no question of estoppel arose.

It was also held that, although the word "appurtenances" used in the lease of 1878 was not apt for the creation of a new right, it easily admitted of a secondary meaning, and was sufficient to cover the right of way in question.

In *Brown v. Alabaster* (1887), 37 Ch. D. 490, the right of way in question was held to pass not as a way of necessity

(although without it the enjoyment of the property in respect of which it was claimed would have been very much interfered with) but by implied grant as being in the nature of a continuous and apparent easement.

Judgment.
Meredith,
C.J.

Mr. Justice Kay, in delivering judgment, described a way of necessity as a "way which is the most convenient access to a land-locked tenement over other property belonging to the grantor,"—language indicating, I think, that the land for which the right of way is claimed must be "land-locked," and that the way of necessity to such land must be the most convenient means of access to it.

In *Cihak v. Klekr* (1886), 117 Ill. 643, the head-note, so far as it is material to the present inquiry, is as follows: "Where the owner of two tenements, or of an entire estate, has so arranged and adapted them that one tenement or one portion of the estate derives a benefit and advantage from the other, of a permanent, open, and visible character, and he sells a portion of the property, the purchaser will take the tenement or portion sold with all the benefits and burdens which so appear at the time of the sale to belong to it. It is not necessary, in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial." This case, therefore, comes within the same class of decisions.

Numerous other cases, most of which are cited or dealt with in the cases from which I have quoted, might be referred to as illustrating and supporting the view which I have expressed.

The weight of authority is, in my opinion, as I have said, against the contention of the defendants as to the conditions and circumstances in which a grantee of land has conferred upon him a right of way to it as a way of necessity, and supports the view that the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

If the defendants' contention were well founded, there

Judgment. must be numberless cases in this Province in which the
Meredith, owner of a lot, one part of which is cut off from the rest of
C.J. it by a swamp or a lake or a pond, would have the right to pass over his neighbour's lands for the purpose of reaching the part cut off from the neighbouring highway, and in the case of double fronted concessions it would follow that the owner of a lot, the principal part of which was accessible to the highway on which it fronted, would have the right of passing from the highway on the other side of the concession over the lot in rear of his own to that part of the latter which is separated by one of these lakes or ponds or morasses from the front part of his lot, upon proof that to form a road or bridge over the lake, pond, or morass would involve an expenditure of money out of all proportion to the benefit to be derived from the creation of that mode of access. Such a state of the law would, as it seems to me, place an intolerable burden upon his neighbour, and one that the Crown, in granting the land, did not contemplate or intend that he should bear.

It would seem to me much more reasonable to conclude that the owner of the lot so situated should himself suffer the inconvenience and loss incident to the natural condition of his land, rather than to permit him to free himself from them by throwing upon his neighbour the burden which the existence of such an easement as is claimed would impose upon his lands,—and I venture to think that in a country such as this a stricter rule should be applied than in England, where the conditions are so different.

The leading text-writers on the subject of easements agree that the necessity which must exist in order that a way of necessity may be created is a "strict necessity" or an "absolute necessity."

In Washburn on Easements, 4th ed., at p. 259, it is spoken of as of "strict necessity."

In Goddard on Easements, 5th ed., p. 36, it is referred to as an "absolute necessity;" and at p. 345 the same writer states his view of the result of the authorities and the law

to be "that a way of necessity can only be acquired when a land owner has no other way to his ground."

Judgment.

Meredith,
C.J.

And Mr. Gale seems to entertain the same view: Gale on Easements, 6th ed., p. 138, where he states his opinion as being opposed to that expressed by Lord Mansfield in *Morris v. Edgington* (1810), 3 Taunt. 24.

See also Elphinstone on the Interpretation of Deeds, Rule 53, and Innes' Law of Easements, 5th ed., sec. 72.

In Rolle's Abridgement, title "Graunts," "Z," paragraph 17, the easement of necessity is thus described: "If I have a close surrounded by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land as incident to the grant: for otherwise he cannot have any benefit of the grant."

The general rule is stated by Serjeant Williams as follows: "Where a man, having a close surrounded with his own land, grants the close to another * * the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself:" 1 Wms. Saund. 322, n. 1, Notes to Saunders, 570.

In *Turnbull v. Rivers* (1825), 3 McCord (South Carolina) 131, the Court of Appeals had to consider the question whether the inconvenience of going always to a plantation by water would amount to such a necessity as would give a way of necessity, and decided it in the negative, holding that "necessity and not inconvenience gives the way." Mr. Justice Nott, in delivering the judgment of the Court, put by way of illustration the very case I am now considering (p. 140), and expressed the opinion that in such a case the seller would not be understood to allow the purchaser a right of way through the whole neck of land, because it might sometimes be more convenient for him to go to his farm by land than by water.

To the report of *Morris v. Edgington*, 12 Revised Reports 579, the learned assistant editor has a note referring to Lord Mansfield's observations in that case, which he states to be opposed to the current of authority.

Judgment.
Meredith,
C.J.

In *McDonald v. Lindall* (1827), 3 Rawle at p. 495, the law is thus stated: "The right of way from necessity, over the land of another, is always of strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbour's would be a better road, more convenient, or less expensive, is not to the purpose; that the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land, that the right of way over the land of another can exist."

The case of *Alley v. Carleton* (1867), 29 Texas 74, cited by the defendants' counsel, is really an authority against his contention. A way of necessity (claimed by a vendor) is there stated to be one "impliedly reserved to the vendor when he sells land surrounding other land of which he is the owner, and to which he can only have access through the grantee's premises;" and it is further said, "a way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own."

The cases to which I have referred, and those mentioned by the text-writers as authorities for their expositions and statements of the law, seem to me to be conclusive against the contention of the defendants; and it is moreover to be observed that the defendants' land is surrounded on all sides but one by a highway,—that highway consisting, it is true, of the waters of the bay,—but I am unable to see why the means of access afforded by such a highway should not be held to prevent the claim to a way of necessity arising, just as much as if the highway were upon dry land.

If I had come to a different conclusion as to the law, I should have required further time to consider whether, if it were to be taken that a way of necessity to the point was impliedly reserved, that way should not be across

Lasher's land to the main road, and not through the lands of the plaintiff—a view in support of which much might be said.

Judgment.

Meredith,
C.J.

There must be judgment for the plaintiff for \$1 damages and for a perpetual injunction restraining the defendants from the repetition or continuance of the acts of trespass complained of, and dismissing the counterclaim.

The plaintiff is entitled to his costs, and the defendants must pay them. But if the action might have been brought in the County Court, they will be on the scale of that Court, with such right of set-off as, according to the practice, exists where an action of the proper competency of that Court is brought in the High Court; and, for the purpose of the disposition of the question of costs, I find that the value of the land affected by the defendants' claim of right is less than \$200, but I express no opinion as to the scale of costs to be applied on taxation.

E. B. B.

[DIVISIONAL COURT.]

CLARRY V. GRAND TRUNK RAILWAY COMPANY.

Railways—Passenger—Contract to Carry—Continuous Journey—Break in Railway—Omnibus Transfer—Demand of Fare—Refusal to Carry—Damages—Costs.

The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, via Galt and Berlin. There was a break in the line of the defendants at Galt, the distance between the stations being three-fourths of a mile; an omnibus was provided, as advertised by the defendants, but the plaintiff was asked to pay a fare of ten cents for transfer in it, and, refusing to do so, was not permitted to be transported free. He failed to make his connection, and brought this action for damages :—

Held, that he was entitled to be conveyed from station to station free of expense; but it would have been reasonable for him to have paid the ten cents and made his connection, and the damages should be restricted to that sum.

Costs on the scale of the County Court, in which the action was brought, were allowed, as it was to test a right.

Statement.

THE plaintiff, a commercial traveller, on the 7th February, 1895, bought a ticket from the defendants "good for one first class continuous passage from Harrisburg to Stratford *via* Galt and Berlin," and proceeded upon his journey in a train of the defendants, in which he was carried from Harrisburg to Galt. It then became necessary for him to leave the train in order to reach another station in Galt, from which the train for Berlin left. An omnibus was at the station of arrival ready to convey passengers to the other station, but a fare of ten cents was demanded for the transit, which the plaintiff refused to pay. The persons in charge of the omnibus declined to carry him without payment of the additional fare, and he accordingly, as he alleged, was unable to continue on his journey to Berlin and Stratford, and was, by reason of the weather and the blocking of the lines between Galt and Stratford, unable to reach his destination for some five days. By reason of the premises, the plaintiff alleged that he suffered great indignity in the presence of other passengers, was put to great loss and expense, and, by reason of having to walk through several feet of snow during a snow storm, was

injured, and lost the profits and remuneration which he would have made in his business during the delay, and was otherwise damaged; and he brought this action against the defendants in the County Court of York to recover \$200. He also made a claim for damage to his luggage, which was not in question in this Court.

The junior Judge of the County Court, at the trial, entered a nonsuit, which the plaintiff now moved to set aside.

The motion was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 11th November, 1897.

J. Bicknell, for the plaintiff. The case should not have been withdrawn from the jury. The defendants had no right to demand an additional fare when the plaintiff had paid for transportation by a continuous passage from Harrisburg to Stratford. The question seems to be a new one; there is no authority directly in point. *Dancey v. Grand Trunk R. W. Co.* (1892), 19 A. R. 664, was a case somewhat similar as to a continuous journey.

Wallace Nesbitt, for the defendants. The contract was to carry by rail, by train, and not by any other method. The defendants have no power to carry otherwise than by rail, as the plaintiff well knew. As to the meaning of "continuous journey," see *Johnson v. Philadelphia, etc., R. R. Co.* (1884), 63 Md. 106. Then, as to damages, it was unreasonable for the plaintiff to refuse to pay the fare demanded and miss his connection. The damages, if the plaintiff is in the right, cannot be more than ten cents. See *Great Western R. W. Co. v. Lowenfeld* (1892), 8 Times L. R. 230; *Cullerton v. Miller* (1892), 26 O. R. 36, at p. 45.

Bicknell, in reply. The question is whether it was reasonable that he should expect to be carried from one station to the other: *Vineberg v. Grand Trunk R. W. Co.* (1886), 13 A. R. 93. As to damages, see *Toronto R. W. Co. v. Grinstead* (1895), 24 S. C. R. 570; *Yeriton v. Milwaukee, etc., R. W. Co.* (1885), 62 Wis. 367.

Judgment. December 18, 1897. BOYD, C.:—

Boyd, C.

The contract of the defendants was to carry the plaintiff by continuous journey from Harrisburg to Stratford, *vid* Galt and Berlin. There appears to have been a break in the line of the company at Galt, where the river had to be crossed—the distance between the stations being three-fourths of a mile. The company advertised that there was an omnibus transfer at Galt. The import of the whole appears to be that the passenger was to be carried the whole distance—he was not called on to walk three-fourths of a mile—and it was the business of the company to see that he was conveyed over this distance free of expense. The fact that there was an omnibus transfer at this point indicates that the passenger was not expected to make his way on foot over the distance between the intermediate termini of the railway system. The 'bus fare was ten cents—and it would have been reasonable for the passenger to have paid this and made his connection. While I think the judgment should be against the company, I do not think more than ten cents damages should be given.

See *Hamlin v. Great Northern R. W. Co.* (1856), 1 H. & N. 408; *Hobbs v. London' and South Western R. W. Co.* (1875), L. R. 10 Q. B. 111; *Craig v. Great Western R. W. Co.* (1865), 24 U. C. R. 504; and *Knight v. Portland, etc., R. R. Co.* (1868), 56 Me. at pp. 241-42.

The question being to test a right, I suppose the usual costs in County Court and of appeal will have to be given—this being only one branch of the action.

FERGUSON and ROBERTSON, JJ., concurred.

E. B. R.

[DIVISIONAL COURT.]

MILES V. ANKATELL ET UX.

Fixtures—Wooden Building—Removability—Mode of Use—Constructive Attachment to Soil—Mortgagor and Mortgagee.

In an action upon a mortgage, the plaintiff claimed, as part of the freehold, a certain erection placed upon the mortgaged premises by the husband of the owner of the equity. The building was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil. It was first used as a shop, and then turned into a dwelling-house, and this was rented for a while by the husband and wife. The building could easily be moved with little or no injury to the soil :—

Held, that it was not in fact affixed or annexed to the soil, but was merely a chattel which might be moved at any time. The onus was on the plaintiff to shew that it could not or ought not to be removed as against him, but the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the conclusion that it was to be deemed constructively attached to the freehold.

AN appeal by the defendant William T. AnkateLL from Statement. the judgment of ARMOUR, C.J., at the trial at Toronto, in favour of the plaintiff in an action upon a mortgage. The plaintiff claimed as against the defendant Susan AnkateLL, the owner of the equity of redemption, the usual foreclosure judgment, and as against both defendants an injunction restraining them from removing a certain building or erection from the mortgaged premises.

The defendant William T. AnkateLL was the husband of his co-defendant, and his evidence was that the building in question was his own, placed upon the mortgaged premises by him, for a temporary purpose, by the leave and license of his wife, who agreed with him, after the making of the mortgage but while it was not in arrear, that he should be at liberty to erect the building and take it down at any time he wished. The building was a wooden one, as described in the judgment of BOYD, C.

The appeal was against that part of the judgment of the trial Judge which granted an injunction to restrain the defendants from removing the building.

Argument.

The appeal was argued before a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 11th November, 1897.

W. J. Clark and *G. H. Galbraith*, for the appellant. The building is nothing more than a chattel. It did not pass to the mortgagee when put up, and was not put up by the mortgagor, but by her husband, by her leave, and not with the intention that it should become annexed to the freehold. Under the authorities it remained a chattel: *Am. & Eng. Encyc. of Law*, vol. 8, p. 43; *Phillips v. Grand River F. M. Fire Ins. Co.* (1881), 46 U. C. R. 334; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Keefer v. Merrill* (1881), 6 A. R. 121. The onus is on the plaintiff to shew that it was part of the realty. The intention of the parties is an important element. See *Amos & Ferrard's Law of Fixtures*, 2nd ed., p. xxix.; *D'Eyncourt v. Gregory* (1866), L. R. 3 Eq. 382; *Kelly v. Austin* (1867), 46 Ill. 156.

J. Bicknell, for the plaintiff. Evidence of intention as disclosed by what took place between husband and wife was not admissible: *Hobson v. Gorringe*, [1897] 1 Ch. 182, 195. The house was put up for the more profitable enjoyment of the land, and is part of it: *Climie v. Wood* (1868), L. R. 3 Ex. 257.

Clark, in reply, referred to *Huntley v. Russell* (1849), 13 Q. B. 572.

December 18, 1897. BOYD, C.:—

The building in question is a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks, laid on the soil, which was perhaps somewhat levelled to make a foundation for it. It was first used as a shop or store, and then turned into a dwelling-house, and this was rented for a while by the mortgagor and her husband. The building could easily be moved, and little or no injury would be done to the soil. This is not in fact affixed or annexed to the soil, but is merely a chattel, which may be moved at any

time: *Wansbrough v. Maton* (1836), 4 A. & E. 884; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674, 689. Judgment.
Boyd, C.

If it is a chattel, then, according to the rules suggested in *Holland v. Hodgson* (1872), L. R. 7 C. P. at pp. 334, 335, the onus is on the plaintiff to shew that it cannot or ought not to be removed as against him. So far he shews nothing, and the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repel the conclusion that it is to be deemed constructively attached to the freehold.

I would reverse the judgment on this point and give the appellant leave to remove the chattel at his own expense. Costs of appeal and of action to the appellant on the lower scale.

FERGUSON, J. :—

After having experienced considerable difficulty amongst the authorities, I am prepared to agree in the judgment of the Chancellor. His description of the structure, the manner in which it was placed upon the soil of the freehold, the uses to which it was put, and the agreement or understanding with the mortgagor at the time of placing the structure where it is, need not be added to.

I think the case differs materially from the case *Phillips v. Grand River F. M. Fire Ins. Co.* (1881), 46 U. C. R. 334, that is, according to the view of what was to be decided there, as stated by the Chief Justice at p. 344.

The tests for determining what are fixtures are very clearly, and, as I think, well, stated in the American and English Encyclopædia of Law, 1st ed., vol. 8, p. 43; but rules or tests, no matter how clear or comprehensive, do not always enable one to arrive at a conclusion in the particular case in hand; and it may be said that each case has to be determined largely upon its own facts.

I had at first some doubts on account of the plaintiff being a mortgagee; for it seems to be a rule that if a mort-

Judgment. gagor lease the mortgaged premises and the tenant erects
Ferguson, J. fixtures, with an understanding with the mortgagor that they will be removable at the end of the term, they become a part of the realty, and, as against the mortgagee, cannot be removed by the tenant. The reason of this rule is stated in the same volume at p. 52. The application of the rule rests, however, upon the fact that the property in question is a "fixture," which is not so in the present case, if the opinion in this regard is correct.

I concur in the Chancellor's judgment and in the disposition as to costs made by him.

ROBERTSON, J. :—

I concur.

E. B. B.

LIGHT V. HAWLEY.

Chattel Mortgage—Validity of—Security Taken in Name of Trustee—Affidavit of Bona Fides—Conversion of Goods—Damages—Measure of—Amendment—Adding Claim—Pleading.

A chattel mortgage to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged chattels, it was contended that the mortgage was invalid because the mortgagee could not properly make the usual affidavit of *bona fides*, as there was no debt due to him:—

Held, notwithstanding there was nothing on the face of the mortgage to shew the fiduciary position of the mortgagee, that the mortgage was valid.

Brodie v. Rutlan (1858), 16 U. C. R. 209, applied and followed.

At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power:—

Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods.

THIS was an action for conversion, tried before MEREDITH, **Statement.** C. J., without a jury, at Napanee, on the 23rd November, 1897. The facts are stated in the judgment.

Clute, Q. C., and *John English*, for the plaintiff.

J. L. Whiting, for the defendant.

December 15, 1897. MEREDITH, C. J.:—

The plaintiff sues as assignee of a chattel mortgage made by one John Conger to Thomas E. Anderson, and by Anderson assigned to him, for the conversion by the defendant, who is the assignee for the benefit of creditors of Conger, of certain of the goods and chattels embraced in the mortgage.

Judgment.Meredith,
C.J.

The circumstances under which the chattel mortgage was given were these. Conger was indebted to Robert Light in a sum of about \$500, and the claim was placed in the hands of Anderson for collection; Conger made payments on account, reducing the debt to about \$260, and then proposed to secure \$250 of this balance by a chattel mortgage on his stock-in-trade, and suggested that the mortgage should be given to Anderson, instead of to his creditor, Light; to this Anderson assented, and he had authority from Robert Light to accept a chattel mortgage for the \$250; the latter assented to the mortgage being taken to Anderson, though not until after it was executed; the mortgage was subsequently assigned to the plaintiff, who is the son and manager of the business of Robert Light.

The contention of the defendant was that the mortgage was invalid; that Anderson could not properly make the affidavit of *bona fides* which the Bills of Sale and Chattel Mortgage Act requires; and that there was no debt due to him at the time the mortgage was given. *Brodie v. Ruttan*, (1858), 16 U. C. R. 207, was relied on by the plaintiff as supporting the validity of the mortgage, and it is, I think, an authority for holding a mortgage executed under the circumstances in which the plaintiff's mortgage was executed, to be a valid security, and it is binding on me. The fact that the mortgagee in that case was described in it as "treasurer of the company" to which the debt which the mortgage was intended to secure was due, while there is nothing on the face of the mortgage in question in this case to shew the fiduciary position of the mortgagee, is not, in my opinion, sufficient to prevent the application of the principle of the case cited to the mortgage in question. That principle I understand to be that a mortgage may be given to one who has no beneficial interest in the debt secured by it, when the mortgagee is in fact a trustee for the person to whom the debt is due.

The plaintiff is, therefore, entitled to recover the damages which he has sustained by reason of the defendant's conversion of the goods.

The evidence shewed that, at the time the goods were

Judgment.

Meredith,
C.J.

taken by the defendant out of the plaintiff's possession, they were in the hands of a bailiff of the latter, who had been instructed by the plaintiff to sell them under the power of sale contained in the mortgage, in order to realize the debt secured by it, and when the defendant intervened, instead of the sale taking place under the power of sale, it was made by him as assignee, but the bailiff who was appointed by the plaintiff conducted the sale for the defendant, and the amount realized by it was just what the plaintiff would have realized had the sale taken place under the power of sale; and he is not, therefore, in my opinion, entitled to recover as damages for the conversion any greater sum than was realized by the sale. He is entitled, I think, to recover the full amount realized, \$108, without any deduction for the cost of keeping possession and feeding and caring for the horses in the interval between the seizure and sale, and to the extent of the expenditure for those purposes is, indeed, in a better position than if he had himself sold.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in the handing over of the goods claimed to the claimants of them.

The plaintiff's counsel contended that the defendant was liable for the value of these goods; but the plaintiff does not in his pleading claim for them, and, in my opinion, deliberately limited his claim to the goods actually sold by the defendant, and I therefore refused leave to amend by adding these goods to the list of goods for the conversion of which the action was brought, as shewn by the statement of claim.

There will be judgment for the plaintiff for \$108, with costs on the proper scale, and with such set-off of costs as the defendant may be entitled to, having regard to the amount recovered in the action.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. CONLIN.

Criminal Law—Larceny from Person—Sentence—Police Magistrate—Jurisdiction—Consent—Criminal Code, secs. 344, 783, 785, 787.

The prisoner consented to be tried, and was tried and convicted, by the police magistrate for a city, for stealing a purse containing \$3.48 from the person, and was sentenced to three years' imprisonment :—

Held, upon the return of a *habeas corpus*, that the offence was an indictable one under sec. 344 of the Criminal Code, whether or not it fell also under the provisions of secs. 783 and 787, and was punishable by imprisonment for any period up to fourteen years, and the magistrate had jurisdiction by virtue of sec. 785.

Statement.

THIS was an application, upon the return of a writ of *habeas corpus* issued upon the order of FALCONBRIDGE, J., in Chambers, and made returnable before a Divisional Court, for an order discharging the prisoner from custody under a warrant of commitment issued pursuant to a conviction by the police magistrate for the city of Hamilton, for theft. The facts, arguments, and authorities are fully stated in the judgment of FERGUSON, J.

The motion was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 12th November, 1897.

Du Vernet, for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

December 22, 1897. FERGUSON, J. :—

The charge against the defendant was stated as follows :—
“ For that the said Frank Conlin, in and at the said city of Hamilton, did on the 22nd day of May, instant, unlawfully steal one purse, containing \$3.48 in money, from the person of Mrs. G. A. Rose.”

The defendant consented to be tried, and was tried, before the police magistrate of Hamilton. He pleaded “ guilty,” and was sentenced to three years' imprisonment in the provincial penitentiary.

The case now is on the return of a *habeas corpus*, it being contended on behalf of the defendant that there was no power to impose on him, for this offence, a sentence in excess of that provided for by sec. 787* of the Criminal Code, namely, imprisonment in the common gaol, with or without hard labour, for a term not exceeding six months. Judgment.
Ferguson, J.

The contention on the part of the Crown was that the case did not fall under the provisions of sec. 783,† but under sec. 344,‡ of the Code, and that the punishment for it might have been as great as fourteen years' imprisonment.

Looking at sec. 783, one sees that the words "larceny from the person" found in clause (a) of sec. 3 of ch. 176, R. S. C., from which this sec. 783 professes to be taken, are not contained in it. These words are left out, and stealing from the person is provided for by sec. 344 of the Code, as this offence was, in conjunction with robbery, provided for by sec. 32 of ch. 164, R. S. C.

By the Revised Statutes of Canada, 1886, "stealing from the person" is thus provided for (or against) by this sec. 32, and "larceny from the person" is provided for by clause (a) of sec. 3 of ch. 176. As it seems to me, the same offence is thus twice provided for.

* 787. In the case of an offence charged under paragraph (a) or (b) of section seven hundred and eighty-three, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months.

† 783. Whenever any person is charged before a magistrate; (a) with having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars; the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

‡ 344. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or valuable security from the person of another.

Judgment. That there was a broad distinction between "larceny" and "larceny from the person," seems clear by a reference to Chitty's Criminal Law, vol. 3, p. 942, and the case *The King v. Pearce* (1810), 2 Leach 1046, as well as Bishop's Criminal Law, sec. 598, all referred to by Mr. Cartwright on the argument. It is said in Chitty's Criminal Law that larceny is aggravated by the fact of the property being taken from the person of the owner.

It appears to me that "stealing from the person" may now be understood to fall under what was formerly meant by the expression "aggravated larceny," that is, larceny aggravated by the fact that the property was taken from the person. (There were many other ways in which the offence might be aggravated.)

The fact that "larceny from the person," or "stealing from the person," is omitted and left out of clause (a) of sec. 783 of the Code, leaving the offence specifically provided against by sec. 344 of the Code, seems to indicate, and I think it does sufficiently indicate, an intention to leave the offence punishable under the provisions of sec. 344. I think this the section applicable to the case here. Even if I thought there was any conflict or difference between sec. 783 and sec. 344, I should be of the opinion that the specific provisions in sec. 344 would prevail over any general provision in the other section or sections.

Then, assuming that the offence charged against this defendant is to be dealt with under the provisions of sec. 344, the Court of General Sessions of the Peace would have jurisdiction to try the case, and this being so, the police magistrate had the power and jurisdiction under the provisions of sec. 785 * of the Code, there being the consent of the defendant, to try the case and pronounce the same sentence as the defendant would have been

* 785. If any person is charged, in the Province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such Province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district

liable to if he had been tried before the General Sessions of the Peace, and such sentence might be imprisonment for any period up to fourteen years. I think the conviction and sentence are right in law, and that we should not interfere with them or either of them on this motion. Judgment.
Ferguson, J.

The having of the body of the defendant in Court was dispensed with, and, in my view, he should remain where he is.

ROBERTSON, J.:—

I have carefully considered all the statutes and cases referred to by Mr. DuVernet on behalf of the convict, and the conclusion I have come to is that the conviction is good. The crime charged is larceny or theft from the person; it does not come under either paragraph (a) or (b) of sec. 783 of the Code, but comes under sec. 785, being an offence for which the accused could be tried at the Court of General Sessions of the Peace. The amount stolen, so far as the money is concerned, is under the \$10 limit, but that is not the gravamen of the offence. The words "from the person" constitute the characteristic of the crime, as distinguished from simple larceny, and whoever is guilty of such a crime is liable to four-teen years' imprisonment in the penitentiary.

Before the passing of 38 Vict. ch. 47, a police magistrate had no jurisdiction in a case such as this, but by secs. 1 and 2 of that Act the jurisdiction was increased so as to enable him to try any case triable at the General Sessions of the Peace, much increasing, therefore, his powers under sec. 783 of the Code, which is a re-enacting of 32 & 33 Vict. ch. 32, sec. 2, and 40 Vict. ch. 31, sec. 3, as consolidated in R. S. C., 1886, ch. 176, sec. 3.

I think, therefore, the police magistrate had jurisdiction.

or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

Judgment. BOYD, C. :—

Boyd, C.

It is not necessary to decide upon the matter mainly argued as to whether the term "theft," as used in sec. 783 of the Criminal Code, comprehends the former offences known as "simple larceny" and "larceny from the person." The old word "larceny" has disappeared from our criminal terminology, as simplified by the Code, and the word "theft" (*i.e.*, stealing) has been substituted (secs. 305 and 356.) I favour the argument of Mr. DuVernet that the word "theft," as used in sec. 783, is of generic import, and is meant to cover the case of "stealing from the person," whether that be what was once called private larceny (*i.e.*, from a man's person without his knowledge), or open larceny (*i.e.*, with his knowledge); but that meaning is not decisive of the question before us. Because here the magistrate sat as the police magistrate of the city of Hamilton, and as such has jurisdiction under sec. 785 of the Criminal Code, with the consent of the person charged, to try any offence which might be tried at a Court of General Sessions. That provision extends to cases such as this, which are indictable offences under sec. 344 of the Code. Now, in this case, the conviction on its face cannot be challenged upon a writ of *habeas corpus*, for it appears that the defendant has been convicted of stealing from the person of Mrs. G. A. Rose, "one purse containing \$3.48 in money." The money value, under or over ten dollars, is not a material element under sec. 344, and the offence provided for in that section is triable by a police magistrate under sec. 785.

There is no ground for interference with the conviction or with the custody of the prisoner.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. OLIVE A. STERNAMAN.

*Criminal Law—Murder—Poisoning—Design—Evidence—Admissibility—
Death of Former Husband of Prisoner.*

Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his last illness, it was proved that his death was due to arsenical poisoning. In order to shew that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning :—
Held, that the evidence was admissible.

CROWN case reserved by ARMOUR, C. J., as follows :— Statement.

“The prisoner was tried and convicted before me at the assizes held in and for the county of Haldimand, at Cayuga, on the 17th, 18th, and 19th days of November, 1897, on an indictment which charged her with the murder of her husband, George H. Sternaman, by arsenical poison.

“The death of George H. Sternaman took place in August, 1896, while he was living with the prisoner, who attended on him throughout his illness, and it was clearly proved that his death was due to arsenical poisoning. In order to shew that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, George H. Sternaman, who had in the same way become suddenly ill after eating food prepared by the prisoner, and that such symptoms were those of arsenical poison. It was objected on behalf of the prisoner that this evidence was not admissible on this indictment. I admitted the evidence, but reserved for the Court of Appeal, being a Divisional Court of the High

Statement. Court of Justice, the question whether evidence of the character above mentioned was admissible."

The case was heard by a Divisional Court composed of BOYD, C., ROSE and FALCONBRIDGE, JJ., on the 31st December, 1897.

W. M. German, for the prisoner. The principle of *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57, is not applicable here, upon the evidence, which fails to shew that the first husband died from arsenical poisoning. [BOYD, C.—We cannot look at the evidence; we are confined to the four corners of the case as stated.] The only question, then, is whether evidence of the character mentioned was admissible, upon the facts as stated by the Chief Justice, and it is submitted it was not.

J. R. Cartwright, Q. C., (*Britton Osler* with him), for the Crown. This case comes strictly within the *Makin* case. The Court may also refer to these cases: *Regina v. Geering* (1849), 18 L. J. N. S. M. C. 215; *Regina v. Garner* (1863), 3 F. & F. 681, 4 F. & F. 346; *Regina v. Gray* (1866), 4 F. & F. 1102; *Regina v. Cotton* (1873), 12 Cox C. C. 400; *Regina v. Roden* (1874), *ib.* 630; *Regina v. Heesom* (1878), 14 Cox C. C. 40; *Regina v. Flannagan* (1884), 15 Cox C. C. 403; *Regina v. Winslow* (1860), 8 Cox C. C. 391 (disapproved in the *Makin* case).

January 3, 1898. BOYD, C.:—

The question of law reserved for the Divisional Court is one touching the reception of evidence at the trial. It was proved that the death of George Sternaman was due to arsenical poisoning, and evidence was received (after objection) to shew that a former husband of the defendant had been taken suddenly ill after eating food prepared by her, and that the symptoms attending his illness and death were those of arsenical poisoning.

In our opinion, this evidence was admissible as going to shew intent and design on the part of the defendant, as was

pointed out by Pollock, C. B., in *Regina v. Geering* (1849), 18 L. J. N. S. M. C. 215, a case which has been followed by many others, particularly *Regina v. Heesom* (1878), 14 Cox C. C. 40, and has received the stamp of approval from the Judicial Committee of the Privy Council in *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57. It appears, therefore, that in point of law this evidence was admissible, and we so answer the case reserved.

Judgment.
Boyd, C.

It is noteworthy that in 1895 the Legislature of New Zealand passed an enactment based on the decision in the *Makin* case, that "on a charge of poisoning, in order to prove that the accused administered the poison as charged, or his intent in so doing, it may be proved that he administered, or attempted to administer, poison on other occasions to the same or other persons:" 1 Journal of Comparative Legislation, pp. 66, 67.

ROSE and FALCONBRIDGE, JJ., concurred.

E. B. B.

[DIVISIONAL COURT.]

REGINA v. WALSH.

Intoxicating Liquors—Liquor License Act—Treating on Sunday—"Other Disposal"—R. S. O. ch. 194, sec. 54.

Treating or giving liquor to friends by a landlord in a private room in his licensed premises on a Sunday is an offence under sec. 54 of R. S. O. ch. 194, and is covered by the words "other disposal" in that section.

Statement. THIS was a motion to quash a conviction by the police magistrate at Ottawa who had convicted the defendant under sec. 54 of The Liquor License Act, R. S. O. ch. 194, of "disposing of" intoxicating liquor on a Sunday.

The evidence shewed that defendant was a licensed hotel-keeper, and had treated two of his friends in a room of his hotel, other than the bar-room, on a Sunday.

The magistrate found that the liquor was given to the friends, that there was no request from them for it, and that there had been no sale of it, or disposal in the nature of a sale.

The motion was made on December 15th, 1897, to a Divisional Court, composed of MEREDITH, C. J., ROSE and MACMAHON, JJ.

Haverson, for the motion, contended that the treating, or gift of the liquor by the landlord, was not a "disposal" under the section; that the word "disposal" as there used means in the nature of a sale, and that "to give" is not covered by the words "to sell."

That the words "sale or other disposal" are not sufficient to take from the licensee the right which every other person enjoys of entertaining his friends at his own expense. That if the conviction is right then the defendant could not allow his private guest wine at his own dining-table. He referred to *Petherick v. Sargent* (1862), 6 L. T. N. S. 48, and *Overton v. Hunter* (1860), 1 L. T. N. S. 366.

Langton, Q. C., supported the conviction, and contended that "disposal" in the expression "sale or other disposal" is intended to have a wide meaning, and included every "disposal" whether gratuitous or otherwise (section 109), which is not a "sale." That the intention was that there should be no evasion of the law by acts which were equivocal, and he referred to R. S. O. ch. 194, secs. 54, 57, 59, and schedule D. form 5, *Anderson v. Anderson* (1895), 1 Q. B. 749; *Regina v. Hodgins* (1886), 12 O. R. 367; *Stroud's Dictionary*, 543. Argument.

Haverson, in reply.

December 16th, 1897. MEREDITH, C. J.:—

The word "disposal" in the section must be taken in its ordinary sense, and a gift is certainly a disposal. In the section in question that word is preceded by the word "other," plainly shewing that while a "sale" is a "disposal," a disposal other than a sale is intended to be guarded against. The object and policy of the section is, that places where liquor is licensed to be sold are to be kept closed during the prohibited hours, and if the contention of the defendant is to prevail, that object would be defeated and the section be almost useless. I think the conviction should be affirmed.

ROSE, J.:—

I agree with the judgment just delivered.

Where specific words are followed by generic words the latter are to be understood in their primary and wide meaning, and the words "other disposal," must be construed as covering such a gift as that in question: *Maxwell's Interpretation of Statutes*, 2nd ed., 413. The language of the ordinance in question in the case of *State of Minnesota v. Gustav Deusting* (1885), 33 Min. 102, was similar to that used in our own statute. There the conviction was sustained.

Judgment. **MACMAHON, J.** :—

MacMahon,
J.

I also quite agree, and think that the language used in sections 57 and 59 of the Act is *in pari materid*, and that they must necessarily be construed so as to prevent the giving away of liquor under the circumstances there mentioned.

G. A. E.

STYLES ET AL. V. THE SUPREME COUNCIL OF THE ROYAL
ARCANUM.

*Life Insurance—Action—Time—Ontario Insurance Act, 60 Vict. ch. 36,
sec. 148 (2)—Enabling Statute.*

The words of sec. 148 (2) of the Ontario Insurance Act, 60 Vict. ch. 36, "notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment.

Statement. THIS was an action brought by the executrix and executor of the will of the late Alfred Jones against a benefit society, to recover \$3,000, the amount of a benefit certificate in the nature of an insurance policy on the life of the testator. The certificate was, on its face, payable to Gertrude Luella May Styles, the daughter of the executrix. The testator by his will appointed the plaintiffs trustees to receive the amount of the insurance on behalf of the beneficiary, she being then an infant. She was added as a plaintiff at the trial. The defences to the action are sufficiently stated in the judgment.

The action was tried by MEREDITH, J., without a jury, at Cornwall, on the 9th December, 1897.

D. B. MacLennan, Q.C., and Adam Johnston, for the plaintiffs.

Aylesworth, Q.C., and D. F. Mac Watt, for the defendants.

December 17, 1897. MEREDITH, J.:—

Judgment.

Meredith, J.

There are four points raised by the defendants as reasons why they should be relieved from payment of the money in question, notwithstanding their written contract to pay.

They say, in the first place, that the claim is barred by lapse of time.

The life insured ended on the 28th day of March, 1895; and the cause of action arose upon furnishing satisfactory evidence of the death, and upon the surrender of the benefit certificate; the contract provided that no action should be brought but within three years from the time the right of action accrued: see the certificate, the application, and sec. 447 of the defendants' constitution and laws.

Upon this point I remain of the opinion expressed at the trial, that the provisions of the Act (sec. 148 (2), ch. 36, 60 Vict. O.), relied upon as a bar to this action, do not apply to this case. Here, by the contract sued on, the limit of time for bringing the action is three years. There is nothing necessarily interfering with that term of the contract. The words, "notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year * *," still seem to me to have reference to a stipulation or agreement giving less time than one year for bringing the action. Otherwise, words must be added, so that, instead of "may be commenced," it will be "may and must be commenced," within the one year, "or be barred." "Shall" or "must" would not be an appropriate word where the contract limits the time to less than a year; "may" is the appropriate word; and there is no reason that I can perceive for turning it into a word inappropriate to such contracts, and at the same time make it affect other contracts which, as permissive, it does not, but, as imperative, it would. Full effect is given to every word of the enact-

Judgment. ment, without altering it in any way, if read as applying
Meredith, J. only to contracts where a limit of less than a year is made. In short, it is an enabling, not a disabling, enactment. Its form is not the usual one of limitation of action:—"no action shall be brought," etc.; but is the opposite to that:—"an action may be brought," etc.

[The learned Judge then proceeded to consider the other three defences, viz., that the insured made an untrue statement as to disease; that the beneficiary was not a "dependent" of the insured, within the meaning of the defendants' "constitutions and laws," at the time of the insured's death; and that proof of dependency at the time of the insured's death had not been furnished in writing, as required by the "constitutions and laws." All these questions he determined, upon the evidence, in favour of the plaintiffs, for whom he gave judgment with costs.]

E. B. B.

RE DOWLER ET AL. V. DUFFY: INGLESBY, GARNISHEE.

Division Courts—Garnishee—Judgment Summons—Committal—Examination—Affidavit—R. S. O. ch. 51, sec. 235—57 Vict. ch. 23, sec. 18—Prohibition.

The County Court Judge, presiding in a Division Court, has no power to commit a garnishee for default in making payments pursuant to an order after judgment; and sec. 18 of 57 Vict. ch. 23 (O.) has not extended his powers in that behalf.

Before a garnishee can be examined under secs. 235 to 248 of R. S. O. 1887 ch. 51, as now permitted by sec. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by sec. 235.

Prohibition against enforcement of committal order.

Statement. AN application by the garnishee for an order of prohibition to the Judge of the County Court of Oxford, the clerk and a bailiff of the 4th Division Court in that county, and Dowler and Sinclair, the primary creditors in a garnishee plaint in that Court, to prohibit them from enforcing a certain order of the 3rd November, 1897, made by the Judge, whereby the garnishee was committed to the common gaol of Oxford for twenty days, and from

issuing any warrant thereupon, or, if issued, from executing the same, on the following grounds:— Statement.

(1) That the garnishee should not have been directed by the Judge on the 15th September, 1897, to pay \$5 per month, or to appear without notice, as such order or direction was beyond the power of the Judge under the statute.

(2) That the order of the 15th September, 1897, and the order of committal of the 3rd November, 1897, were made on the same summons (the original summons by which the plaint was begun), which was dated the 1st September, 1897, and such orders were not preceded by an affidavit of the plaintiff, his solicitor or agent, as required by sec. 235 of the Division Courts Act.

(3) That the statutes give no power to a Judge to commit a garnishee to prison.

(4) That the Judge having by his order of the 15th September, 1897, directed the garnishee to pay \$5 per month, and, if unpaid, to attend without notice, which order is indorsed on the summons, and is still in force, the order of committal of the 3rd November, 1897, is illegal.

(5) That the garnishee, on the 3rd November, 1897, attended before the Judge, as directed, yet the Judge neglected to have him sworn, and no evidence was taken by the Judge, although the garnishee attended to be sworn and to make answers touching his estate and effects, and no inquiry was made as to the ability of the garnishee to pay \$5 per month since the order was made.

And upon the grounds set forth in the affidavit of the garnishee, who stated that he was served with the original summons on the 1st September, 1897; that he attended at the sittings of the Division Court on the 15th September, 1897, when judgment was entered against him for \$75 in favour of the primary creditors; that subsequently on the same day, by direction of the Judge, he was examined by the primary creditors and disclosed that all his personal property had been seized by the sheriff and sold under execution, and that his real estate had been sold under mortgages, and that he had no property, and was in receipt

Statement. of no money except such as he chanced to earn as a working man, and had depending upon him for support his wife and two children, whereupon the Judge directed him to pay \$5 per month, or to appear on the 3rd November, 1897, without notice; that from the 15th September, 1897, to the 3rd November, 1897, he had no means other than by labouring of making any money, and made barely enough to pay the common living expenses of a man in his station; that on the 3rd November, 1897, he appeared before the Judge to explain why he had been unable to pay the \$5 per month, when the Judge, without having him sworn, asked him if he had paid the \$5 ordered, and on receiving the answer, "No, I couldn't pay it," without giving him an opportunity to explain, made the committal order; that the only summons served upon him was that served on the 1st September; that he had no opportunity of presenting, and was not assisted by counsel in presenting, the facts of his position before the Judge, and was wholly unable to understand why he was not permitted to be sworn and to give evidence.

The motion for prohibition was heard by ROBERTSON, J., in Chambers, on the 22nd November, 1897.

H. J. Duncan, for the applicant.

Masten, for the primary creditors.

The arguments are referred to in the judgment.

December 27, 1897. ROBERTSON, J. (after stating the facts as above):—

It appears from the affidavits and papers filed that this was a summons to primary debtor and garnishee before judgment, claiming from the debtor \$75 on a promissory note, and to garnish a debt due from the garnishee to the debtor to the extent of that sum. On the 15th September, 1897, judgment was given against the debtor for that sum with costs, finding that the garnishee was indebted to such debtor in \$75, which ought to be applied in satisfaction

thereof, and directing that the creditor do recover against the garnishee \$75 in ten days in satisfaction as aforesaid. Judgment.
Robertson, J.

On the top of the memorandum of judgment is indorsed these words: "Directed to pay \$5 per month or to appear without notice. A. Finkle."

It will be noted that this order does not state who is "directed to pay," and the judgment being against the primary debtor as well as against the garnishee, it is impossible to say which is intended.

The 235th section of the Division Courts Act, R. S. O. 1887 ch. 51, provides that before the judgment summons shall issue, the plaintiff, his solicitor or agent, shall make an affidavit and file same with the clerk, that the judgment remains unsatisfied; that deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof, or that he has rendered himself liable to be committed to gaol under the Act.

No such affidavit was filed.

The 246th section provides that: "In case the defendant * * has been personally served, * * or personally appears at the trial, and judgment is given against him, the Judge, at the hearing of the cause, * * may examine the defendant and the plaintiff and any other person touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff has obtained a summons for that purpose after judgment."

Acting under this section, the learned Judge, on the day of the trial and of giving the judgment, permitted the primary creditors to examine the garnishee, the result being that he directed verbally that the garnishee should pay \$5 per month, or appear at the next sittings of the Court on the 3rd November, 1897, without notice. The garnishee, then, in his affidavit now on file in this matter, says: "That from the said 15th September, 1897, to the 3rd November, 1897, I had no means other than by labouring of making anything, and I made barely enough

Judgment. to pay the ordinary common living expenses of a man in my station;" and he also states that he had depending on him for support his wife and two children.

Robertson, J.

He appeared on the 3rd November to explain why he had been unable to pay the \$5 per month directed, when the learned Judge, without swearing the garnishee, asked him: "Have you paid the \$5 as I ordered?" to which he replied, "No, I cannot pay it;" whereupon, without giving the garnishee an opportunity to explain, the Judge instantly said: "Then I commit you to gaol;" nor was he sworn, etc.

There is an order indorsed on the original summons, which is against both debtor and garnishee, in these words: "Ordered to be committed to the common gaol of the county of Oxford for twenty days, it appearing to me that the defendant has had since the said judgment was obtained against him sufficient means and ability to pay the said debt." (Signed) Alex. Finkle, J. C. C. Oxford. Dated 3rd November, 1897.

How it could appear, if the garnishee is meant, that since the said judgment he had sufficient means and ability to pay, etc., is difficult to understand, as the garnishee was not sworn, nor allowed to be sworn; and I do not think under such circumstances a man should be deprived of his liberty—treated as a fraudulent debtor who can, but will not pay. There is an affidavit of Mr. Brown, the creditors' solicitor, however, which states that the Judge asked the garnishee "whether his circumstances had changed since the order was made against him?" And he replied, "They have not;" whereupon the Judge said he would commit him to gaol. I do not think this helps the matter—the garnishee had a right then to be sworn as to why he had not paid, etc., and I do not think the Judge had any power to commit, if he had power to commit at all, as hereinafter will be considered, without hearing any explanation that the person being examined had to give, under oath, etc.

It is contended for the primary creditors that 57 Vict.

(1894) ch. 23, sec. 18,* extends to garnishees the provisions of secs. 184 to 187 of the said Act, and that garnishees are now liable not only to be examined as judgment debtors under secs. 235 to 248 of the Division Courts Act, but to all the consequences following, inclusive of the committal of the garnishee. Judgment.
Robertson, J.

In the first place, there is no order in writing to commit the "garnishee," but an order to commit "the defendant," and in *Re Hanna v. Coulson* (1894), 21 A.R. 692, it was held that a "garnishee" is not a "defendant" within the meaning of the Division Courts Act, R. S. O. 1887 ch. 51, sec. 235 *et seq.* And in my judgment the amendment contained in sec. 18 does not go further than to allow and permit a garnishee to be examined in the same way as an ordinary judgment debtor is examined under the above sections. The liberty of the subject is involved in this, and when that is intended to be interfered with, the statute must be explicit and clear. I can understand why the judgment creditor should have a right to examine a garnishee against whom he has recovered a judgment for the purpose of making out, if he can, that there is property belonging to the garnishee which can be taken in execution, if its whereabouts can be ascertained, but there is no right on the part of the creditor, or power given to the Judge to commit to prison for non-payment. I think the language of Mr. Justice MacLennan in *Re Hanna v. Coulson* exactly states the relative positions of the creditor and the garnishee. At p. 696 he says: "The plaintiffs cannot be said to have an unsatisfied judgment or order for the payment of any debt, damages, or costs against the appellant (the garnishee). Notwithstanding the garnishment proceedings the garnishee's debt is still due to his own creditor and not to the appellants, and the appellants attach it and receive it, if and when they do receive it, not as something

* 18. In cases in which judgment shall be recovered against a garnishee under sections 184 or 187 of the said Act, such garnishee shall be liable to be examined as a judgment debtor under sections 235 to 248, inclusive, of the said Act.

Judgment. due to them from the garnishee, but as something belonging to their debtor, which they have been enabled to lay hold of by the process of the Court." And he refers, as being most conclusive to the appeal in that case, to the language of Bowen, L. J., in *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, at p. 105, where he shews that garnishment creates no debt either legal or equitable from the garnishee to the judgment creditor:—"There is an order of a Court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue," etc.

And Mr. Justice Burton in the same case says: "I agree in dismissing the appeal for the reasons given by Armour, C. J. Any other interpretation of the statute might expose a person whose debt has been garnished to most serious inconveniences, and until the Legislature has expressed in unmistakeable terms that it means to extend the meaning of the word to a garnishee I shall decline so to construe it."

Now the Legislature has not done what Mr. Justice Burton is of opinion they should do, that is, it has not declared that a garnishee shall be considered a defendant, nor has it declared that he shall be liable to imprisonment if he does not pay the debt which he owes to another, but which has been attached for the benefit of a third party.

In my judgment, there is no power in the County Court Judge to commit for non-payment of a garnished debt, and in this case the order is so ambiguous that it is invalid and of no effect; in fact, strictly construed, it does not affect the garnishee, but the judgment debtor, who is the defendant. I think also that before a garnishee can be examined under the sections referred to, no matter whether at the trial of the case, immediately after the judgment has been pronounced, or on a further occasion, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by sec. 235, which gives the Judge jurisdiction to hear the examination of the party.

I think, therefore, the order should go as applied for, Judgment and that the costs should be paid by the judgment cred- Robertson, J. itors.

E. B. B.

[DIVISIONAL COURT.]

O'CONNOR V. GEMMILL ET AL.

Solicitor—Services in Exchequer Court of Canada—Agreement with Client—Compensation en Bloc—Invalidity—Champerty—Account—Jurisdiction of Provincial Court—Ascertainment of Proper Compensation—Bill of Costs—Solicitors Act, R. S. O. 1887 ch. 147—Quantum Meruit—Evidence.

The plaintiff, a suppliant in an action brought against the Crown, by its permission, in the Exchequer Court of Canada, made an agreement with the defendants, a firm of solicitors, that they should conduct her case to judgment, and, in consideration of their doing so at their own expense, that they should be entitled to retain to their own use one-fourth of the sum which should be recovered, and she assigned her claim to them as security for the performance of the agreement:—

Held, a champertous agreement, and not binding on the plaintiff.

Ball v. Warwick (1888), 50 L. J. N. S. C. L. 328, and *In re Attorneys and Solicitors Acts* (1875), 1 Ch. D. 573, followed.

2. Although the services of the defendants under the agreement were performed in a Dominion Court, a Provincial Court had jurisdiction to entertain an action for an account against the solicitors in respect of moneys received by them from the Crown in satisfaction of the claim.
 3. The services performed by the defendants in the Exchequer Court were not performed as officers of the Courts of Ontario, and, with respect to such services and the remuneration therefor, the defendants were not subject to the Solicitors Act, R. S. O. 1887 ch. 147, and could not be compelled to deliver a bill of costs.
 4. In the absence of a tariff of costs between solicitor and client in the Exchequer Court, the defendants were entitled to remuneration upon a *quantum meruit*, to be established by such evidence as would be appropriate in the forum of litigation.
- Paradis v. Bossé* (1892), 21 S. C. R. 419, and *Armour v. Kilmer* (1897), 28 O. R. 618, followed.

THIS was an action brought by the widow and adminis- Statement.
tratrix of the estate of the late Mr. Justice O'Connor
against a firm of solicitors for an account of moneys in
their hands and payment to her of such amount as should
be found due.

The plaintiff, by her statement of claim, alleged that in
the month of January, 1895, she employed the defendants,

Statement. as solicitors, to prosecute an action then pending in the Exchequer Court of Canada for the recovery of a large sum of money for professional services rendered in his lifetime to the Crown by her deceased husband, when at the bar, in which action she was the suppliant and Her Majesty was the defendant; that in May, 1896, a judgment was obtained by her in that action for \$6,000; that in June, 1896, the defendants, as her solicitors, obtained payment of that sum from the Crown; that the defendants had paid her \$4,200 out of the \$6,000, but neglected and refused to pay or account for the balance.

The defendants set up in answer to the action an agreement between the plaintiff and them, dated the 18th March, 1895, which, after reciting that the plaintiff had begun the action in the Exchequer Court above referred to, was as follows:—

“ And whereas the said action is at issue, and the party of the first part, being financially unable to pay counsel to prepare for trial, and to conduct her case at trial, and to produce before the presiding Judge such evidence as she may have to support her said claim, hath proposed to the parties of the second part that, if they will at their own expense take all such steps as, in their opinion, may be requisite to obtain a hearing of the said case in the Exchequer Court, and carry the same to final judgment and payment of such moneys as may be recovered from Her Majesty, the said parties of the second part shall be entitled to retain, out of such moneys which may be paid by Her Majesty in respect of such claim, a commission of twenty-five per cent. thereof, together with any sum which the parties of the second part may pay to witnesses over and above the fees which may be taxed to such witnesses, and, in addition to such commission and excess of witness fees, that they shall be entitled to retain to their own use whatever costs they may recover from Her Majesty. And the said parties of the second part have agreed to the proposal of the party of the first part, subject to the party of the first part assigning the said claim to the parties of the

second part, as a security for the due performance of this Statement. agreement by the party of the first part.

"Now, this agreement witnesseth that, in consideration of the premises, and of the sum of \$1 of lawful money of Canada now paid by the parties of the second part to the party of the first part, the receipt whereof is hereby acknowledged, she, the said party of the first part, doth hereby transfer, sell, assign, and make over unto the parties of the second part all the said claim of \$27,000 against Her Majesty the Queen, and the action against Her Majesty, pending in favour of the said party of the first part, with the costs already incurred in said action, subject to the said parties of the second part paying to the said party of the first part, or her assigns, the balance of moneys recovered from Her Majesty in respect of said claim, after deducting for their own absolute use and benefit twenty-five per cent. of such moneys, and the excess, if any, of the moneys paid to witnesses over and above what may be taxed to such witnesses, the said parties of the second part being entitled also to retain, in addition to such commission and excess of witness fees, whatever costs they may recover from Her Majesty in the said action.

"And, for the purposes aforesaid, the said party of the first part doth hereby nominate and appoint the said parties of the second part her attorneys irrevocable, and doth give them full power and authority to prosecute the suit now pending for the said debt, to final judgment."

The defendants also set up in their defence a receipt and release signed and sealed by the defendant, dated the 5th June, 1896, as follows:—

"Received from Messrs. Gemmill and May the sum of \$4,200 as settlement in full with them of the moneys payable to me from the moneys recovered by them from the Crown in the action of Mary O'Connor, as administratrix, against Her Majesty the Queen, in the Exchequer Court of Canada—the same being the proportion payable to me as per agreement with them—Mr. Nesbitt's counsel fee being

Statement. also paid by me; and I hereby release them from all accounts or reckonings for the said moneys so recovered by them as aforesaid."

The defendants alleged that the \$4,200 paid to the plaintiff by them was the balance of the \$6,000, after deducting all fees, charges, and disbursements duly and properly payable to them in respect of their services as solicitors in the Exchequer Court; and by particulars subsequently delivered shewed that they claimed \$1,500 "as per agreement," \$200 as a counsel fee to Mr. Nesbitt, and \$75 for fees paid to witnesses; and they brought into Court \$25, which they alleged they had retained to pay to a witness, who afterwards declined to accept it.

By her reply the plaintiff alleged that the agreement of the 18th March, 1895, was champertous, illegal, and void, and the sum of \$1,800 was largely in excess of what was properly payable to the defendants for their services and disbursements; that the plaintiff was willing to allow the defendants reasonable compensation for their services; that the release and acquittance of the 5th June, 1896, was null and void, for misrepresentations, improvidence, etc.

By a consent judgment in this action, pronounced on the 19th June, 1897, after reciting that the defendants had waived and abandoned the release referred to in the defence, it was ordered and adjudged:—

1. That the defendants should within two weeks deliver to the plaintiff a bill of their costs, charges, and disbursements in *O'Connor v. The Queen*.

2. That the action and the bill, when delivered, be referred to Mr. Thom, one of the taxing officers at Toronto:—

(a) To determine and decide whether the agreement of the 18th March, 1895, was or was not valid and binding upon the plaintiff.

(b) To determine whether, in view of the fact that the action of *O'Connor v. The Queen* was brought in the Exchequer Court of Canada, and having regard to the said agreement (if held to be valid and binding), the plaintiff was

entitled to delivery of a solicitor and client bill of costs and to taxation thereof. Statement.

(c) If the plaintiff was so entitled, to tax such bill as between solicitor and client.

(d) If the plaintiff was not so entitled, then to consider and determine (having regard to the agreement, if valid) whether \$1,775 was a fair and proper allowance to the defendants for their services and disbursements, and, if not, what sum would be a fair and proper compensation.

The taxing officer proceeded with the inquiry, and on the 30th September, 1897, gave an interim certificate shewing that he had ruled as to (a) that the agreement was not valid and binding on the plaintiff, and as to (b) that the plaintiff was entitled to delivery of a solicitor and client bill of costs and to taxation thereof.

The defendants appealed from this certificate to a Judge in Court, and their appeal was dismissed by MEREDITH, J., on the 19th October, 1897.

The defendants then appealed to a Divisional Court from the order of MEREDITH, J., upon the following grounds:—

1. (a) The agreement by the solicitor with the plaintiff was in respect of proceedings in the Exchequer Court of Canada, not subject to the jurisdiction of this Court, and the solicitors were and are, in respect of these proceedings and of the agreement in question, officers of the Exchequer Court, and that Court alone can deal with the subject of the agreement and the remuneration of the solicitors in respect of the proceedings, and the solicitors are not amenable to the jurisdiction of this Court in respect of the proceedings or the agreement or the remuneration, and the agreement was not subject to the jurisdiction of this Court in any manner.

(b) The agreement was and is valid, in any event, and there was not and could not be champerty or maintenance in respect of a suit against the Crown, brought by the permission of the Crown, and the agreement was not tainted by champerty or maintenance.

Statement.

2. It is admitted that there is no tariff of costs established between solicitor and client in respect of proceedings in the Exchequer Court, and the only way a solicitor can provide for his remuneration is by an agreement such as that in question.

3. If the question of the remuneration of the solicitor is within the jurisdiction of this Court, and the provisions of the Solicitors Act, R. S. O. ch. 147, then the agreement was and is a valid agreement under sec. 51 of that Act.

4. It is improper to direct a taxation; there is no means of taxing, no rate or standard laid down; and injustice will be done to the solicitor by an attempt to tax.

5. The parties to the agreement, before the work was undertaken, by agreement, with a full knowledge of what was required to be done and the difficulties in full view, settled and determined the amount of the *quantum meruit* of the solicitors, who successfully carried out their undertaking under the agreement, and were entitled to have it performed by the plaintiff.

6. In any event, there cannot properly be a taxation; the solicitors are entitled, apart from the agreement, to a *quantum meruit*; the negotiations, steps, and work in respect of the proceedings in the Exchequer Court were of a class and nature removed from ordinary litigation in this Court, and cannot be remunerated or covered by the items of an ordinary solicitors' tariff, and were performed necessarily out of Court, and the actual proceedings in Court were a very small part of the work.

The appeal was heard by BOYD, C., FERGUSON and ROBERTSON, JJ., on the 8th November, 1897.

Arnoldi, Q. C., for the defendants. The High Court of Justice has no jurisdiction to deal with this case at all, the services in respect of which the agreement in question was made being rendered in the Exchequer Court of Canada by the defendants, as officers of that Court. This Court will not order taxation of costs incurred in another Court: *Re Cameron* (1868), 1 Ch. Chamb. R. 356. [BOYD, C.—This

Court has full jurisdiction to entertain the action ; it is a Argument.
 matter of ordinary accounting, and plainly a matter of
 civil right in the Province.] The agreement is not cham-
 pertous *in se*. It was for payment of the solicitors, and
 not for dividing of spoils, apart from advocacy: *Bradlaugh*
v. Newdegate (1883), 11 Q. B. D. at p. 9 ; *Fischer v.*
Kamala Naicker (1860), 8 Moo. Ind. App. at p. 187 ;
Ram Coomar v. Chunder (1876), 2 App. Cas. 186. There
 was no promotion of litigation here : see Pollock on Con-
 tracts, 6th ed., p. 330 ; Tapp on Maintenance, p. 110 to
 end of book ; *Re Cannon* (1886-7), 13 O. R. 70, 705.
 [BOYD, C.—*Rees v. DeBernardy*, [1896] 2 Ch. 437, *per*
Romer, J. The agreement seems to me to be champertous.]
 There is another reason why the agreement cannot be called
 champertous ; the proceedings to which it related were
 taken in the Exchequer Court under leave obtained from
 the Crown. [BOYD, C.—I do not see how that can make
 any difference.] Then, such an agreement, if the matter
 comes within the Solicitors Act, is specially recognized and
 validated by secs. 50-53 of that Act, R. S. O. 1887 ch. 147.
 Section 51 applies to general work and not merely to con-
 veyancing. But, if this Court has the right to deal with
 the remuneration to be allowed for the defendants' services,
 there is still no jurisdiction to compel the defendants to
 deliver a bill and to subject that bill to taxation ; the
 remuneration must be upon a *quantum meruit*. *Re*
Newman (1861), 30 Beav. 196, does not apply. There
 cannot be a taxation, as there is no tariff applicable as
 between solicitor and client to Exchequer Court litigation :
The Queen v. Doutre (1881-4), 6 S. C. R. 342, 9 App. Cas.
 745 ; *Paradis v. Bossé* (1892), 21 S. C. R. 419.

F. A. Anglin, for the plaintiff. The agreement is cham-
 pertous ; the solicitor is to carry on the litigation and to get
 no compensation if there is no recovery, but if there is a
 recovery he is to get a share. This is champerty or main-
 tenance : 28 Edw. III. ch. 11 ; *Ball v. Warwick* (1881), 50
 L. J. N. S. C. L. 382 ; *Rees v. DeBernardy*, [1896] 2 Ch.
 437 ; *Reynell v. Sprye* (1852), 1 DeG. M. & G. 660 ; *James*

Argument. v. *Kerr* (1888), 40 Ch. D. 449; *Earle v. Hopwood* (1861), 9 C. B. N. S. 566; *Kenney v. Browne* (1796), 3 Ridgeway 462; *Pittman v. Prudential Deposit Bank* (1896), 41 Sol. J. 129. As to sec. 51 of the Solicitors Act, the Law Courts Act, 1895 ch. 13, sec. 38, is an answer, and it has been held that sec. 51 applies only to conveyancing charges: *Ford v. Mason* (1894), 16 P. R. 25; *Ostrom v. Benjamin* (1893), 20 A. R. 336. [BOYD, C.—You need not labour that point.] But, at all events, secs. 31 and 39 expressly cover this case. Again, the solicitor practises in the Exchequer Court by virtue of his being a solicitor of the Provincial Courts: *Paradis v. Bossé* (1892), 21 S. C. R. at p. 421. Even under the English Act an agreement like this could not stand: see the English Solicitors Act, 33 & 34 Vict. ch. 28, sec. 11; *In re Attorneys and Solicitors Act* (1875), 1 Ch. D. 573; *Rees v. DeBernardy*, [1896] 2 Ch. 437. The agreement is also attacked on the ground that it is an agreement for a fixed sum in advance: *Re Newman* (1861), 30 Beav. 196, approved in *Ostrom v. Benjamin* (1893), 20 A. R. 336. So, the agreement is bad quite apart from champerty. It was an improvident agreement obtained unduly, apart from all other circumstances. Solicitors are bound to deliver a bill, in some shape or other, to shew their services, and it is liable to taxation. That is recognized by the terms of the consent judgment. See, also, *Boak v. Merchants Marine Ins. Co.* (1879), Cass. Dig. S. C. 677; *Paradis v. Bossé* (1892), 21 S. C. R. 419; *Ostrom v. Benjamin* (1893), 20 A. R. 336; *Allen v. Aldridge* (1843), 5 Beav. 401; *Re Osborne* (1858), 25 Beav. 353; *Re Jones* (1872), L. R. 13 Eq. 336; *Re Parker* (1882), 21 Ch. D. 408; *Re O'Donohoe* (1868), 4 P. R. 266. Item 165 of our tariff provides for services outside the tariff.

Arnoldi, in reply. The tariff of costs covers only proceedings in the Courts of Ontario. Solicitors are officers of the Exchequer Court when they practise there, and the Ontario Act does not apply: *Ostrom v. Benjamin* (1893), 20 A. R. 336. There is no legal right to delivery of a bill

of costs where the work done does not fall within the **Argument.**
Solicitors Act.

Anglin asked leave to refer to *Re Prince* (1871), 3 Ch. Chamb. R. 282.

December 18, 1897. BOYD, C.:—

In so far as the judgment declares the agreement set up, claiming compensation *en bloc*, to be invalid and to form no bar to the investigation of what was fairly due to the solicitors, I agree with it, for reasons given during the argument, and embodied in the cases of *Ball v. Warwick* (1881), 50 L. J. N. S. C. L. 382, and *In re Attorneys and Solicitors Acts* (1875), 1 Ch. D. 573.

So far as that judgment affirms the right to the delivery and taxation of a bill of costs, I disagree with it, for these reasons:—

The solicitors in this case were not engaged or doing business as officers of the Courts of Ontario, and were not acting under the provisions of the Solicitors Act, R. S. O. 1887 ch. 147. Their services were had and rendered as solicitors of the Exchequer Court of Canada. Though they obtained their status as solicitors in that jurisdiction because they were already solicitors in Ontario, yet their acts done were not as solicitors in any Court in this Province, but as officers and solicitors of a Dominion Court: R. S. C. ch. 135, secs. 16 and 18. In this latter capacity they are not subject to the summary jurisdiction affecting officers of the Ontario Courts, nor are they subject to the special restrictions and rules affecting solicitors' costs and charges found in secs. 31 *et seq.* of the Ontario Solicitors Act. The position is novel, but light is thrown upon it by these cases: *Williams v. Odell* (1817), 4 Price 279; *Re Anonymous* (1849), 19 L. J. N. S. Ex. 219; *Re Johnson* (1888), 37 Ch. D. 442, affirmed in the Lords (1890), 15 App. Cas. 203.

The solicitors must be paid for their services, but they are left to the remedies given by the general law—and that

Judgment. also is the measure of the rights of the client in this case.
Boyd, C. In such exceptional cases, and where no tariff is provided by the Court—as there is not between solicitor and client in the Dominion Court of Exchequer—they must recover as upon a *quantum meruit*, and by means of such evidence as is appropriate in the forum of litigation—which is in this case the Province of Ontario: *Paradis v. Bossé* (1892), 21 S. C. R. 419, and *Armour v. Kilmer*,* as lately decided by me.

This part of the judgment is vacated, and the other part affirmed, and, as success is divided, there should be no costs.†

The consent judgment, though rather a puzzle, appears to mean that, in any event, Mr. Thom is to decide what is to be paid for the defendants' services. This he will now do upon proper evidence and not as upon a taxation of costs.

FERGUSON and ROBERTSON, JJ., concurred.

E. B. B.

* Now reported 28 O. R. 618.

† This direction as to costs was afterwards varied, and all costs reserved till after the amount of compensation was ascertained.

BRERETON V. CANADIAN PACIFIC RAILWAY COMPANY.

Action—Jurisdiction of Ontario Courts—Injury to Land in Another Province—Local or Transitory Action.

The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate :—

Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario Court ; but *aliter* as to the furniture, on abandonment of the claim for destruction of the house.

Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, [1893] A. C. 602, followed.

Campbell v. McGregor (1889), 29 N. B. Reps. 644, not followed.

THIS was an action in the High Court of Justice for Ontario, to recover damages for the destruction by fire of the plaintiff's house and furniture, being on land situated in the Province of Manitoba. The facts appear in the judgment. Statement.

The action was set down for trial at the Rat Portage Autumn Sittings, 1897, but the trial of the issues of fact was postponed till after the determination of a question of law raised by the statement of defence, viz., whether the cause of action was cognizable in Ontario.

This question was argued before BOYD, C., at Osgoode Hall, on the 27th December, 1897.

Shepley, Q. C., for the plaintiff.

Aylesworth, Q. C., for the defendants.

January 4, 1898. BOYD, C. :—

The trial of this action at Rat Portage was postponed on the understanding that the contest concerning jurisdiction raised on the record should be separately deter-

Judgment.

Boyd, C.

mined. That point has been argued, and involves the question whether the matter litigated can be or should be entertained by an Ontario Court. The plaintiff's grievance is that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises are alleged to be at a point known as Cross lake, in the Province of Manitoba, on which there was a house containing furniture and ordinary household goods, the property of the plaintiff. The cause of action, therefore, arose in Manitoba, where the plaintiff himself resides, and in which the defendants are legally domiciled and actually carry on business.

There is unquestionable right to have this complaint determined in the Manitoba Courts, and, wherever tried, the law of that Province must govern. Why then are the proceedings and trial to be in Ontario? No special reason is given or suggested. It is said there is the right to bring and prosecute the action here, for the action sounds in tort, and is a transitory one. Even if that position is established, the cases shew that, although jurisdiction exists in Ontario, yet it may rest in the sound discretion of the Court as to whether the action shall be entertained.

All reasons of convenience point to Manitoba as the proper forum. The plaintiff's title to the land (of which the house forms part) is disputed, and that issue must be decided by the *lex rei sitæ*. The parties reside in Manitoba, where the cause of injury arose; and the expense of private litigation arising in one Province should not be transferred to another at the mere option of the plaintiff. Again, if the case is one in which a view is desired, it will be difficult, if not impossible, to effect that in a legal manner. These and like considerations are very cogent to shew that jurisdiction ought not to be exercised in such cases of extraneous origin, if objection is made by the defendant. And authorities are not wanting to support the conclusion that some special reason must exist to induce the Court of one Province or country to entertain actions

that legitimately belong to another Province or country. It is enough to refer to the language of Wright, J., in *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358, at p. 367, and cases cited; and of American decisions to *Burdick v. Freeman* (1887), 46 Hun 138, and *Great Western R. W. Co. v. Miller* (1869), 19 Mich. 305.

Judgment.

Boyd, C.

But, apart from discretionary jurisdiction, the larger question is whether the Courts of Ontario can, on sound principles of general law and inter-provincial comity, take cognizance of actions relating to immovable property outside of the boundaries of Ontario. The precise point now in hand has not been decided, though the field has been much investigated in the case of *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358, and in appeal to the Lords, [1893] A. C. 602. The ultimate decision there was that an action of trespass upon foreign land, though only damages were claimed, could not be entertained by an English Court. In this case the action is not in trespass, but for negligence; but one must not rest on the name or the form without seeing what underlies.

As in the *Mocambique* case, it is necessary to go back to some of the old learning as to forms of action and local and transitory venues. This kind of action in respect of the negligent spread of fire was one not of trespass, but on the case. The term "on the case" was in this regard an abbreviation of the more formal "trespass on the case for negligence," as may be seen under that title in Comyns's Digest. See *Turberville v. Stamp* (1696), 12 Mod. 152; *Filliter v. Phippard* (1847), 11 Q. B. 347; and *Smith v. London and South Western R. W. Co.* (1870), L. R. 6 C. P. 14.

The distinction between the two is discussed in the note to *Morley v. Guisford* (1795), 3 Rev. Rep. 432, and it is there laid down accurately that "where the injury is not immediately, but only consequential upon the act done, the remedy is case, and not trespass:" (p. 434, no. IV.)

Judgment. For a more minute discussion, consult Spence's Eq. Jurisd., vol. I., pp. 242, 249.
Boyd, C.

The next inquiry is as to the nature of this action, whether local or transitory. Here is no direct trespass upon the land, but there is injury to the land by the burning of the house, which is the principal thing destroyed. In Bacon's Abr., under title "actions local and transitory," the distinction is made that the first "relates to lands, which must be tried where the lands lie; the other to a debt or duty adhering to the person:" (I., p. 65.) And in Comyns's Digest: "Every action founded upon a local thing shall be brought in the county where the cause of action arises; for there it can be best tried." (Tit., "Action," N. 5., p. 259.) So Knightley, J., says in *Gawen v. Hussee* (1538), Dyer R. 38 b: "If a man have cause of action of a thing which arises from land, perhaps because it savours of the nature of the land, the action shall be brought where the land is, which is the principal." So again, in Chitty on Pleading, 7th ed., vol. I., it is said: "Actions, though merely for damages, occasioned by injuries to real property, are local, as trespass or case for nuisances, or waste, etc., to houses, lands, watercourses, right of common, ways, or other real property, unless there were some contract between the parties on which to ground the action:" p. 281. And at p. 282: "In all actions for injuries *ex delicto* to the person or to personal property, the venue is in general transitory, and may be laid in any county, though committed out of the jurisdiction of our Courts, or of the Queen's dominions."

The definition of Marshall, C. J., in *Livingston v. Jefferson* (1811), 1 Brock. 203, has met with approval more than once in the English Courts, and he says (p. 209): "Actions are deemed transitory where the transaction on which they are founded might have taken place anywhere, but local where their cause is in its nature necessarily local." (See *Whitaker v. Forbes* (1875), 1 C. P. D. at p. 53, and *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. at p. 401.)

This is the vital point in the inquiry, whether this cause of action is local or not, because the cardinal rule in regard to jurisdiction was long ago laid down by Buller, J., in *Doulson v. Matthews* (1792), 4 T. R. 503. "We may try actions here," he said, "which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." Approved in *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602, 621.

Judgment.

Boyd, C.

Is this claim, for injuries to the land, local in its nature?

In a New Hampshire case, where the old English cases are much canvassed, it is said by Gilchrist, C. J.: "It is a general rule that case for an injury to land is a local action, and that the suit should be brought in the county where the cause of action arose:" *Worster v. Winnipiseogee Lake Co.* (1852), 25 N. H. (or 5 Fost.) at p. 535.

The controlling incident of locality is to be considered not so much with reference to the parties or to the means by which, or to the place at which, the injury was done, but rather as to the nature of the subject of the injury: *Simmons v. Lillystone* (1853), 8 Ex. 431, 441; *Jefferies v. Duncombe* (1809), 11 East 226, 229. Here, however, these things co-exist in a locality outside of Ontario; for in Manitoba the parties are resident, the injurious act, or rather the negligence which occasioned the injury, occurred in Manitoba, and in Manitoba is situate the immovable property injured. A chattel or other piece of personal property is capable of being injured at one place as well as another, but land with its fixtures is capable of being injured only at the place of its site, so that damage thereto (whether direct, as in trespass *quare clausum fregit*, or indirect and consequential, as in case) is essentially a local thing. That the plaintiff's right to recover depends on his proving negligence is true, but it is equally true that if he has no title to the property destroyed, his action must fail: *Bull v. Grand Trunk R. W. Co.* (1866), 16 C. P. 252, 256; and, beyond this, the injury he sues for is because his land has been damaged, and this being a local

Judgment. matter, the whole transaction falls under the jurisdiction of
Boyd, C. Manitoba, to the exclusion of Ontario.

Therefore I conclude that there are two salient objections fatal to the further maintenance of this action: (1) the injury complained of is to land in Manitoba; and (2) the plaintiff's title to that land is disputed on the pleadings and in fact.

Once it is found that trespass on the case for injury to land through negligence is of the same local character as trespass to the land, the controversy is covered by the *Mocambique* case in the Lords.

The New Brunswick case of *Campbell v. McGregor* (1889), 29 N. B. Reps. 644, is on all fours with the present, but I cannot agree with the finding in favour of jurisdiction there; as the aspect of the case now discussed does not appear to be broached. The ground of decision by Mr. Justice King was on the footing of a personal tort, but without being asked to consider the exception which exists when the tort arises in respect of land out of the jurisdiction.

As against the Louisiana case cited in the judgment of Fry, L. J., in *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. at p. 412, I would oppose those of several States coming to an opposite conclusion conformable with what is now decided. These are on the very point as to an action of law founded on spreading fires: *Huenermund v. Erie R. W. Co.* (1874), 48 How. Pr. 55, and *Nashville, etc., R. W. Co. v. Weeks* (1884), 13 Lea (Tenn.) 148.

There remains to consider the goods and household furniture alleged to be consumed in the house. For the loss of these as personal chattels an action may be maintained anywhere, and if the rest of the action is abandoned, the plaintiff may prosecute as to this part of his claim; but without this, he cannot sever his action into two parts—that would be splitting one cause of action, which is abhorrent to the law. The principal complaint is as to the house; the rest is accessory; and the jurisdic-

tion to entertain the action as a whole must turn upon the locality of the land. Judgment.

Boyd, C.

For general statements as to jurisdiction in kindred cases, see *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, *per* Willes, J., at p. 28; *Jackson v. Spittall* (1870), L. R. 5 C. P. at p. 549.

Boni judicis est ampliare jurisdictionem is a maxim that is open, when literally rendered, to Lord Bacon's animadversion of being a "foolish saying," but, in modern paraphrase, it enjoins no more than to amplify remedies for the attainment of substantial justice without usurping jurisdiction. (See *per* Fitzgerald, J., in *Tobin v. Cleary* (1874), Ir. R. 8 C. L. at p. 375.)

The case is not one for costs, both from its nicety and its novelty.

E. B. B.

NEIL V. ALMOND ET AL.

*Execution—Fi. Fa. Lands—Limitation of Actions—Renewal of Fi. Fa.—
"Lien"—"Proceeding"—"Money Charged upon Land"—R. S. O.
ch. 111, sec. 23.*

The right of an execution creditor under a *fi. fa.* lands in the hands of the sheriff of the county in which the lands of the debtor are situate is a "lien," and the money mentioned in the writ is "money charged upon land." Taking steps to sell under such a writ is a "proceeding," and although duly renewed if the writ has been more than ten years in the sheriff's hands, and no payment or acknowledgment has in the meantime been made or given as required by section 23 of R. S. O. ch. 111, the lien is gone, and proceedings on the writ will be restrained.

THIS was a motion for judgment on the pleadings in an Statement.
action brought by the grantee of land to restrain proceedings under a *fi. fa.* lands more than ten years old, against his grantor, although the *fi. fa.* had been placed in the sheriff's hands for execution during the ownership of the grantor and had been regularly renewed from time to time.

The facts are more fully set out in the judgment.

Argument. The motion was argued in Court on October 26, 1897, before FERGUSON, J.

W. H. P. Clement, for the plaintiff. The plaintiff is a purchaser for value without notice. A writ of *fi. fa.* is a lien upon the lands affected thereby, and the moneys mentioned in it are moneys charged upon such lands within the meaning of R. S. O. ch. 111, sec. 23. The writ in this case having been issued in 1884 has ceased to be a lien or charge upon any land even although regularly renewed as provided by law. One of the defendants died in 1892, and the action was not revived, so the charge, if any, under the *fi. fa.* is gone. The plaintiff's title to the land is good against any charge, the right to enforce which arose more than ten years ago. The effect of a *fi. fa.* lands still depends on the Imperial statute 5 Geo. II. ch. 7, under which real estate in colonies was made liable to be sold for debt. The execution debtor owned the land when the *fi. fa.* was placed in the sheriff's hands and the writ then became a lien or charge, and the sheriff had the right to enter, and sections 4, 15 and 23, R. S. O. ch. 111, applied. The right to enter is gone: section 4. The right is extinguished: section 15. I refer to *Beaton v. Boyd* (1897), 17 C. L. T. Occ. N. 56; *Allan v. McTavish* (1878), 2 A. R. 278; *Boice v. O'Loane* (1878), 3 A. R. 169; *McMahon v. Spencer* (1886), 13 A. R. 430; *Mason v. Johnston* (1893), 20 A. R. 412.

R. B. Beaumont, for the mortgagees from the purchaser appeared on notice and asked leave to appeal if so advised, as this was a motion on the pleadings and not a trial.

W. H. Blake, for the execution creditor. The purchase was not carried through in 1885 as the purchaser did not register his deed until after he mortgaged the land in 1891. The *fi. fa.* was a valid charge in 1892, and therefore after the sale, after the registration of the deed, after the mortgage was made and before the death of any of the parties. The plaintiff's argument rests on three assumptions (1) that a *fi. fa.* is a "lien" or "charge on land"; (2) that

steps taken by a sheriff to sell are "proceedings"; and (3) **Argument.** that time runs from the date of placing the *fi. fa.* in the sheriff's hands, and not from the last renewal. In a broad and inaccurate sense, a *fi. fa.* can be called a lien or charge, but when it comes to a precise definition this is not so. It is something more and something less—it is a *fi. fa.* The liens and charges spoken of in the Act are those created by the act of the parties or a decree of a Court. The efficacy of a *fi. fa.* depends upon something other than such act or decree. The Act does not cover a *fi. fa.* and so take away the effect of a renewal. The use of the words "lien," "charge" and "proceedings," does not conclude the matter, and it is necessary to see what the Legislature meant by them. The onus is upon the plaintiff to shew that the usual and familiar result should not flow from a renewal. A sheriff does not make any such entry or distress as is mentioned in section 4. I refer to *Doe d. McIntosh v. McDonell* (1835), 4 O. S. 195; *Gardiner v. Gardiner* (1848), 2 O. S. at p. 532; *Doe Auldjo v. Hollister* (1855), 5 O. S. 739; *Doe d. McPherson v. Hunter* (1848), 4 U. C. R. 449; *Burnham v. Daly* (1853), 11 U. C. R. 211; *Ruttan v. Levisconte* (1859), 16 U. C. R. 495; *Re Hime & Leadley* (1889), 13 P. R. 1; *Price v. Wade* (1891), 14 P. R. 351; *Patterson v. McKellar* (1884), 4 O. R. 407; *Samuel v. Duke* (1838), 3 M. & W. 622; Arts. 8 C. L. T. 205, 242; Harrison's C. L. P. Act 344, 352, notes.

Clement, in reply, referred to *Caspar v. Keachie* (1877), 41 U. C. R. 599; *Jay v. Johnstone* [1893] 1 Q. B. 25; Sweet's Law Dictionary 140; Smith's Action at Law, 8th ed., 287 *et seq.*

December 13, 1897. FERGUSON, J.:—

On the 20th day of April, 1884, the defendant Job Almond recovered a judgment in the County Court of the county of Grey against one James Ellis and his son, Isaac Ellis, for \$182.68, and on the same day caused writs of *fi. fa.* against goods and lands issued upon this judg-

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Judgment. ment to be placed in the hands of the sheriff of that
Ferguson, J. county to be executed.

The writ against lands has ever since remained in the hands of the sheriff to be executed and has been from time to time renewed according to the law in force at the time of each such renewal. (Nothing being at present said as to a contention that there should have been a revivor of the judgment after the death of one of the defendants in that action.)

On the 16th of February, 1885, the plaintiff purchased from the said James Ellis for valuable consideration the east half of lot number nine in the seventh concession of the township of Collingwood in the said county of Grey, without actual notice of the said judgment or execution against lands, received a conveyance pursuant to the purchase and thereupon entered upon the land, and has since hitherto continued in possession and occupation of the same and has made valuable improvements thereon.

The conveyance from James Ellis to the plaintiff was not registered till the 19th day of February, 1891.

On the 30th day of January, 1891, the plaintiff executed a mortgage upon this land in favour of the defendants the Canada Permanent Loan and Savings Society, to secure a loan to him of the sum of \$1,200 and interest. This mortgage still subsists and there is, as is said, owing upon it this principal sum of \$1,200 and interest thereon since the 1st day of March, 1897.

It is unquestioned that the writ against lands, upon being as aforesaid placed in the hands of the sheriff to be executed attached upon the lands in question, these lands being in the county, and James Ellis, one of the defendants in the action in which the writ was issued, having such an interest in the land as was saleable under an execution (in this instance the estate in fee).

It is alleged (apparently without contradiction) that the plaintiff had not actual notice or knowledge of the judgment or the execution against lands till the 21st day of January, 1896.

The defendant Job Almond demands payment from the plaintiff of the amount of the judgment and is threatening to proceed to sell the lands under the execution. Judgment.
Ferguson,

The plaintiff claims a declaration that the judgment aforesaid and the writ of *feri facias* against lands issued thereon form no charge or lien upon these lands and an injunction restraining the defendant Job Almond from enforcing the said judgment as against the said lands.

I do not know that the case is a proper one for making a declaration of right in the ordinary sense. The action is not objected to on this ground. The injunction is claimed and the action must be, as I think, entertained.

The plaintiff contended that the case falls under the provisions of sec. 23 of ch. 111 R. S. O., which provides amongst other things that no action or other proceeding shall be brought to recover out of any land any sum of money secured by any mortgage or lien or otherwise charged upon or payable out of such land but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime, etc., etc.

There has not been paid any part of the amount of this judgment—principal or interest—nor has there been any acknowledgement such as is mentioned or referred to in that section.

It is plain that more than ten years had elapsed after the placing of the execution against lands in the hands of the sheriff to be executed and before these threatened proceedings to sell the land under that writ, and that there was from the time the writ was so placed in the sheriff's hands a present right to receive the money and a person capable of giving a discharge for or a release in respect of the same.

For the defence it was contended, however, that a writ of *feri facias* against lands in the hands of the sheriff to be executed did not constitute a charge or lien upon the lands within the meaning of the provisions of this section 23, and that even if it did, the charge or lien was not a

Judgment. continuing one on account of the necessity for renewing
Ferguson, J. the writ and its having been from time to time renewed; this latter embracing the contention that upon each renewal of the writ there was a new beginning of the charge or lien, if there was really such charge or lien at all, by reason of the writ being so in the hands of the sheriff.

As to the contention in respect to the renewals of the writ I refer to a provision contained in Rule 872, which is: "And a writ so renewed shall have effect and be entitled to priority, according to the time of the original delivery thereof." The same provision is contained in Rule 894 of the Consolidated Rules of 1888, and also in Rule 353 of the Judicature Act, 1881. This provision continued as it has been from a period prior to the placing of this writ in the hands of the sheriff (and no doubt it was the law earlier than that period) seems to me to indicate clearly that the renewals of this writ did not constitute new commencements of the charge or lien, if there was a charge or lien within the meaning of the section, and that if it be assumed that there was such charge or lien within the meaning of the section when the writ was placed in the sheriff's hands, the same charge or lien was simply continued by the successive renewals of the writ.

The right of the execution creditor may properly be called a lien. This right is called by this name in the 13th sec. of 29 Vict. ch. 18 (C.), an Act amending the Insolvent Act of 1864. It is also called by this name in R. S. O. 1887, ch. 124, sec. 9.

In the English and American Encyclopædia of Law, vol. 12, pp. 106 and 107, it is said that in some States of the Union the judgment lien does not attach until an execution has been issued or levied.

The money mentioned in a writ of *feri facias* against land is, I think, money charged upon the lands (in the county) of the person against whom the writ is and I think there can be no doubt that it is money payable out of such lands, and I am of the opinion that the right of the execution creditor in the present case was in character

a lien or charge upon and for money payable out of the lands of the execution debtor lying in the county. Judgment.
Ferguson, J.

The taking steps to sell the land under the provisions of Rule 881 Con. Rule 906, provisions that were substantially contained in successive statutes since 2 Geo. IV., ch. 1, sec. 20, is, or would be a proceeding falling within the meaning of the words "other proceeding" in sec. 23 of ch. 111 above. In the English and American Encyclopædia of Law, vol. 19, p. 220, note 2, it is said: "'Proceeding,' means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. It is an act necessary to be done in order to attain a given end; it is a prescribed mode of action for carrying into effect a legal right, and so far from involving any consideration or determination of the right pre-supposes its existence."

In the Century Dictionary "proceeding" is defined by the words "especially a measure or step taken."

In the case *Smith v. Brown* (1890), 20 O. R. 165, I was of the opinion that an advertisement for sale of land was a "proceeding" within the meaning of the words "no further proceedings" in sec. 30, ch. 102 R. S. O.

In *Casper v. Keachie* (1877), 41 U. C. R. 599, it was held that a writ of revivor or suggestion entered upon the roll is a proceeding, and that a judgment was to be considered as charged upon or payable out of land within the meaning of the Act then in force. As to the judgment, the law has, however, since been changed.

According to the various definitions I find of the word "bring," I do not think the use in the statute of the word "brought" stands in the way, and after having examined the numerous authorities referred to on the argument of the case, I am of the opinion that the action threatened by the defendant would be a proceeding to recover money that was a lien, and charged upon, and payable out of the land, and that the case falls under the provisions of sec 23 of ch. 111 R. S. O.

I am, therefore, of the opinion that the order asked should go. But I do not think it a case in which I should give costs of the motion.

Judgment. In these circumstances it is not necessary that I should decide anything in respect of the question as to the necessity of a revivor of the judgment.

I do not think I should make any declaration of right in the ordinary sense of that expression.

The order for the injunction may go, but without costs of the motion.

G. A. R.

[DIVISIONAL COURT.]

RE LOTT ET AL. V. CAMERON.

Prohibition—Division Court—Amount in Dispute—Unsettled Account—Apparent Want of Jurisdiction—Interest—Part Prohibition.

The summons in a Division Court plaint stated the plaintiffs' claim to be \$109.73, the amount of an account with interest. The account, as shewn by the particulars annexed, was a debit and credit one, consisting on the debit side of a number of items, aggregating \$456.50. and on the credit side of items of cash payments, amounting to \$361.50, leaving a balance of \$95, which, with \$14.73 claimed for interest, made the \$109.73. Judgment for the plaintiffs was signed for that amount for default of a dispute note:—

Held, that it did not appear on the face of the proceedings that the account was an unsettled one; for all that appeared, the account, though exceeding \$400, might have been a settled account, and the balance of \$95 an admitted balance; and therefore the jurisdiction of the Division Court was not excluded by sec. 77 of the Division Courts Act, R.S.O. 1887 ch. 51.

But the amount claimed was beyond the jurisdiction of the Division Court, as defined by sec. 70, sub-sec. (1), clause (b).

As, however, the claim for interest was severable, the prohibition should be limited to the excess over \$100.

Trimble v. Miller (1892), 22 O. R. 500, followed.

Statement. APPLICATION by the defendant for an order that the plaintiffs, the clerk of the 1st Division Court in the county of Lambton, and the sheriff of that county, be prohibited from further proceedings in a plaint in that Court wherein J. M. Lott & Co. were plaintiffs, and the applicant was defendant, and especially under a writ of *fieri facias* dated the 4th April, 1895, commanding the sheriff to levy the amount of the judgment therein, with interest and costs,

of the lands and tenements of the defendant, and for an order directing the repayment by the plaintiffs and the sheriff of \$98, the amount for which the lands of the applicant were sold under the writ. The facts are stated in the judgment. Statement.

The motion was heard by MEREDITH, C.J., in Chambers, on the 12th November, 1897.

C. J. Holman, for the defendant.

J. H. Moss, for the plaintiffs.

December 9, 1897. MEREDITH, C.J.:—

The proceedings in the Division Court were begun on the 9th March, 1895, by the issue of a special summons, in which the plaintiffs' claim is stated to be the sum of \$109.73, the amount of an annexed account, together with interest thereon.

The annexed account is a debit and credit account between the defendant and the plaintiffs, consisting on the debit side of a number of items aggregating in the whole \$456.50 for flour supplied by the plaintiffs to the defendant between the 15th March and 26th July, 1892, inclusive, and on the credit side of various items of credit, amounting in the whole to \$361.50, all being cash payments, and shewing a balance of \$95, which is brought down, and to which is added the sum of \$14.73 for interest, making in all \$109.73, which is the amount of the claim as stated in the summons and claim annexed to it.

It was urged by the applicant that want of jurisdiction in the Division Court appears on the face of the proceedings, and for this he relied on sec. 70, sub-sec. (1), clause (b), of the Division Courts Act, R. S. O. 1887 ch. 51, which gives jurisdiction to hear and determine all claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100; and on sec. 77, which forbids the recovery of more

Judgment. than \$100 in any action for the balance of an unsettled
Meredith, account, and provides also against an action for any such
C.J. balance being sustained where the unsettled account in
the whole exceeds \$400.

It was contended that the account shews on its face that it is an unsettled one, in the whole exceeding \$400, and that, in any case, the balance claimed being in excess of \$100, the claim, by reason of the first mentioned provision, was beyond the jurisdiction of the Division Court.

Assuming that, where the want of jurisdiction is apparent on the face of the proceedings, the granting of prohibition is not discretionary, which appears to be well settled, it is equally well settled that where it is not so apparent, the granting of prohibition is discretionary. If discretionary, this case is certainly not one in which the discretion should be exercised in the applicant's favour. That the debt sued for was owing by him to the plaintiffs is not denied; for it the plaintiffs recovered judgment by default nearly three years ago; and this application is not made until after the lands of the defendant have been sold under the execution issued upon the judgment.

Then, does the want of jurisdiction appear on the face of the proceedings? I am of opinion that it does not. For all that appears, the account, though exceeding in amount \$400, may have been a settled account, and the balance of \$95 may have been an agreed or admitted balance. It is, I think, a fair test as to whether want of jurisdiction is apparent on the face of the proceedings, to inquire whether, had the objection been raised at the trial, the Judge could have entered upon the inquiry as to whether the whole account was a settled one and whether the balance claimed was an admitted or settled balance. That he could have done so, seems to me to be clear. The general jurisdiction conferred by sec. 70, sub-sec. (1), clause (b), is to hear and determine claims of the class mentioned in clause (b), where the amount or balance claimed does not exceed \$100; and if it were not for the provisions of sec. 77, the amount of the account in respect of which the balance is claimed

would have been wholly immaterial. The effect of sec. 77 is, I think, to exclude this general jurisdiction when it is made to appear that the account in respect of which the balance is claimed is an unsettled one, and that it exceeds in the whole \$400, but until that does appear, the jurisdiction to entertain the claim is unaffected. It is, I think, only on the hypothesis that upon reading the particulars it is apparent that the balance claimed is not an agreed balance and that the account is an unsettled one, that want of jurisdiction can be said to be apparent on the face of the proceedings, and such an assumption is not, I think, warranted in this case, the particulars being silent on both points.

Judgment.
Meredith,
C.J.

Different considerations apply to the other branch of the applicant's case. The jurisdiction of the Division Court to hear and determine claims in excess of \$100 is not general, but limited to cases in which the amount or original amount of the claim is ascertained by the signature of the defendant: sec. 70, sub-sec. (1), clause (c): and therefore it is, I think, apparent on the face of the proceedings that the amount claimed is beyond the jurisdiction of the Court; that amount, however, is made up of \$95, the balance of the account, and \$14.73 interest. The claim for interest is clearly severable from the rest of the claim, and the authorities warrant my limiting the prohibition to that part of the claim which brings it up to an amount in excess of \$100: *Trimble v. Miller* (1892), 22 O. R. 500.

Apart from these considerations, the conclusion to which I come upon the affidavits filed upon the motion is that certain of the entries in the account are, as the plaintiffs say, mere cross-entries, and, eliminating them, the amount of the account is less than \$400. The affidavit of the plaintiff Lott shews that the items of debit of March 24th and 31st, and of April 6th, 12th, 18th, and 30th, amounting to \$146, should not appear in the account, as the items of March 25th, April 9th, 16th, 19th, 21st, and May 10th, on the credit side, were respectively payments of these items. That this was so is denied by the defendant, but exhibit

Judgment. A. to his affidavit of the 10th November, 1897, supports the statement of Lott, which is that the defendant paid \$20.50 on account of the first debit item in the account, leaving due on it \$1, and that is, according to the exhibit referred to, the balance due on the 26th March, and again on the 21st April, which lends strong probability to Lott's statement, which is, in effect, that that balance remained due on the first purchase of flour by the defendant, and that cash was paid for each subsequent purchase down to about the beginning of May.

The result is that the order for prohibition will go, limited to further proceedings on the judgment so far only as the amount of the judgment debt is in excess of \$100.

There will be no costs to either party.

I refer also to *Broad v. Perkins* (1888), 4 Times L. R. 775.

The defendant appealed from this decision, seeking an order for total prohibition, and his appeal was heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 19th January, 1898.

C. J. Holman, for the appellant.

J. H. Moss, for the plaintiffs, was not called upon.

THE COURT affirmed the decision of MEREDITH, C.J., and dismissed the appeal with costs.

E B. B.

GOLD MEDAL FURNITURE MFG. CO. V. LUMBERS.

Landlord and Tenant—Termination of Tenancy—Agreement—"Disposing" of Premises—Notice to Quit—False Representations—Covenant for Quiet Enjoyment—Disturbance—Breach—Acquiescence—Damages.

A lease of part of a building contained a proviso that in the event of the lessor disposing of the building, the lessees should go out on notice; and shortly after the lease was made he notified them to vacate, as he had disposed of his interest in the building; which they did, under protest.

The alleged disposal was by an agreement in writing between the lessor and another, whereby the latter was to have superintendence of the building, to obtain tenants at higher rents, and to collect the rents; the leases to be in the name of the former; the latter to have a sub-lease on the happening of certain events and an option to purchase at any time before its expiration:—

Held, not a disposal of the building within the meaning of the proviso; but, as the lessor had not intentionally, wilfully, or maliciously misled the lessees, and was acting in good faith upon what he believed to be his rights, there was no actionable false representation.

Derry v. Peek (1889), 14 App. Cas. 337, followed.

But the lessees were entitled to damages for breach of the short form covenant, contained in the lease, for quiet enjoyment "without interruption or disturbance from the lessor;" the covenant being against the lessor's own acts, it was not material whether the act assigned as a breach was lawful or not; and the acts here done were in breach of the covenant, for there was no right to give the notice to quit, nor to complain that the lessees acted upon it without waiting for an action to be brought.

Edge v. Boileau (1885), 16 Q. B. D. 117, followed.

Cowling v. Dickson (1880), 45 U. C. R. 94, 5 A. R. 549, discussed.

An agreement made after the notice, under which the lessees went out before the day named, was not an acquiescence in the lessor's demand; for they complied under protest, and leaving earlier merely lessened the damages.

Assessment of damages as in a case of eviction.

THIS was an action for fraudulent representations, tried *Statement.* before ROSE, J., without a jury, at Toronto, on the 19th October, 1897. The facts are stated in the judgment.

S. H. Blake, Q.C., and F. C. Cooke, for the plaintiffs.

Watson, Q.C., and S. C. Smoke, for the defendant.

January 5, 1898. ROSE, J.:—

The plaintiff company was lessee of the defendant under a lease dated 12th November, 1896, made in pursuance of the Act respecting short forms of leases. It contained a

Judgment.
Rose, J.

proviso in the words following: "Provided that in the event of the lessor disposing of the factory, the lessees will vacate the premises, if necessary, on receiving six months' notice or a bonus of three hundred and fifty dollars."

On the 31st December, 1896, the defendant wrote to the plaintiff as follows: "As I have disposed of my interest in the factory premises, I beg to notify you that you will be required to vacate that portion of the premises occupied by your firm on or before the 1st July, 1897."

The lease under which the plaintiff held was of a portion of a building, other portions being occupied by other tenants of the defendant. Some communications were had between the plaintiff and the defendant, and on the 22nd January the defendant wrote to the plaintiff, giving the option of vacating prior to the 30th June, as follows: "At the end of any one month between now and the 30th June next, and also providing that you give me one clear month's notice of your intention to vacate." To this the plaintiff answered on the 29th January as follows: "In reply to your two notices of December 31st and January 22nd, would say it is very inconvenient for us to move at present, as our stock is very large, and in June is our busy month, when we could not move. However, we have no option, as you have sold the property. So we hereby notify you that we will vacate our present premises at the end of February, 1897, under protest, as we can find no sale registered." In the letter of the 22nd January the defendant stated that the property had been sold. The plaintiff moved out of the premises; and on the 1st March the solicitors made a demand upon the defendant for \$2,550 damages sustained by reason of alleged fraudulent representations on the part of the defendant. The action was brought alleging fraudulent representation. The plaintiff claims that the premises had not been disposed of at the time of giving the notice.

The fact was, as I find it upon the evidence, that negotiations were proceeding on the day the first letter was written, namely, the 31st December, 1896, a draft agree-

ment having been prepared, which was subsequently settled and executed on the 11th January, 1897. So that, in fact, no agreement had been entered into on the 31st December, 1896. The agreement of the 11th January, 1897, is peculiar, and requires a little consideration to determine its character. It is made between the defendant and one James Gardner, and recites that the parties "desire so to manage and deal with the said lands and premises as to cause the same to return an income greater than the expenditure now required to be made by the said Lumbers in connection therewith." It provides that Gardner is to have superintendence of the building and of obtaining tenants at rentals greater than the rentals then being received; that the defendant was to advance a sum not greater than \$1,000 to make improvements; that whatever Gardner did was to be done for and in the name of the defendant, who was to collect all rents and returns; the leases to be in the defendant's name, and the tenants to be his tenants. Then it was provided that if the income by the 1st January, 1898, should exceed the total expenditure, Gardner might call for and the defendant should grant to him a sublease of the lands and premises, and further, that if, on the said 1st day of January, 1898, the returns should be greater than the expenditure, "and from the nature of the tenancies then existing it shall appear probable that such return will continue for a period of three months thereafter, then on the said 1st day of January, 1898, the said Gardner shall accept from the said Lumbers and the said Lumbers shall grant to the said Gardner a sublease of the said lands and premises." The rent was fixed by the following paragraph; and by paragraph 8 the said Gardner was given the option of purchasing the premises at the price of \$25,000, "at any time before the expiration of the said proposed tenancy." As I understand this agreement, the defendant retained possession and control of the premises, giving Gardner an option to take a lease, and, if that lease was taken, an option to purchase.

Judgment.

Rose, J.

Judgment.

Rose, J.

As a matter of fact, Gardner did not exercise his option but failed to carry out his business undertakings, and disappeared from the country.

I am asked to say whether or not either on the 31st December or the 11th January the premises had been disposed of. I have not been much assisted by any reference to authorities on this point. Counsel were unable to find anything directly in point; and such search as I have been able to make has not disclosed any decisions which are very helpful. I think that a fair definition of the word "dispose" may be obtained from considering what might not be done. I do not think, nor did counsel seriously contend, that, if the defendant had desired to turn out the plaintiff so as to let another tenant into the same premises at an increased rent, any agreement with the incoming tenant could be called a disposition of the premises. Nor do I think that the defendant could have turned the plaintiff out until he had, by some contract binding upon himself, placed the premises out of his power and control. The agreement between the defendant and Gardner clearly expresses the object the parties had in view, namely, to increase the income arising from the rents, and for such purpose the plaintiff was put out of the premises. It was within the intent and meaning of that agreement that the plaintiff should be put out of the premises, and that some other tenant should be gotten in, and power was given to Gardner, under the supervision and control of the defendant, to get in new tenants at increased rents. The option given to Gardner to take a lease was not, I think, a disposition of the factory; it was too conditional and hypothetical. It depended upon getting out the old tenants and getting in new at increased rents, or obtaining increased rents from the old tenants. And I do not think that any agreement made with Gardner which contemplated the getting out of old tenants and putting in new, or disturbing old tenants in their possession so as to compel them to enter into new agreements at increased rents, would be a disposition of the factory. Nor can it be said

that the including in the agreement of an option to purchase, if Gardner should become tenant of the premises, was a disposition of the factory within the meaning of the clause. The whole of the agreement with Gardner was based upon what seems to me to be a misconception of the rights and privileges of the defendant, he asserting the right to turn out the plaintiff simply and solely for the purpose of getting an increased rental from the property.

Judgment.

Rose, J.

I have come to the conclusion that the factory was not disposed of within the meaning of the proviso contained in the lease. When the letter of the 31st December was written, there was not, in fact, any concluded agreement, between the defendant and Gardner, and the agreement which was signed, as of date the 11th January, was not, as I think, a disposition of the factory by the defendant. Certainly, on neither date had the factory been sold to Gardner, as stated by the defendant in his letter of the 22nd January, 1897. Therefore, in my opinion, the right to give the plaintiff the notice to quit provided for by the lease did not arise.

I do not, however, find that the defendant intentionally, wilfully, or maliciously misled the plaintiff. I think he was acting upon what he believed to be his rights, and was acting in good faith, in the sense of doing what he did to advance his own interests in accordance with what he believed to be his rights under the proviso. I accept his suggestion that, apart from his scheme, it would have been folly for him to have turned out a good tenant such as the plaintiff company was, on the chance of getting in a new tenant. The premises were a burthen to him. He was carrying them at a considerable loss and with some financial difficulty. His object was, of course, to keep the premises rented and to obtain from them the greatest income practicable. I therefore cannot find any false and fraudulent representation to the plaintiff; and I think the case of *Derry v. Peek* (1889), 14 App. Cas. 337, is an authority against the plaintiff's right to recover on the record as framed.

But Mr. Blake urged very strongly upon me that this

Judgment. case could be well distinguished from *Derry v. Peek*,
Rose, J. because here the defendant owed a duty to the plaintiff to know the fact and to state the fact correctly, and that, having stated what was not the fact, for his own benefit and to the detriment of the plaintiff, the plaintiff having acted upon such statement, the defendant was liable in damages for making such misstatement. Mr. Blake urged that the case *Derry v. Peek* had not overruled the old case of *Polhill v. Walter* (1832), 3 B. & Ad. 114.

I do not find it necessary to determine this question, although it seems to me somewhat difficult to distinguish this case from *Derry v. Peek* or *White v. Sage* (1892), 19 A. R. 135, for I think the plaintiff may succeed for a breach of the covenant for quiet enjoyment. That covenant is a covenant by the lessor that the lessee "shall and may peaceably possess and enjoy the said demised premises for the term hereby granted without any interruption or disturbance from the lessor * *." My attention was called to the statement made in *Cowling v. Dickson* (1880), 45 U. C. R. 94 (in appeal, 5 A. R. 549), in the dissenting judgment of Armour, J., at p. 104, that the covenant for quiet enjoyment is a covenant against rightful evictions and not against wrongful ones. I think this statement must be limited to acts of third parties, for where the lessor covenants against his own acts, it would seem that it is not necessary to consider whether the act was lawful or unlawful. I refer to Redman & Lyon's Law of Landlord and Tenant, 3rd ed., p. 140, where it is said: "Both implied and express general covenants for quiet enjoyment are confined to lawful, and do not extend to wrongful, evictions, unless the lessor himself be the disturber; for the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant be express for that purpose: *Dudley v. Folliott* (1790), 3 T. R. 584; *Wotton v. Hele* (1671), 2 Wms. Saund. 178 (8)." See also Rawle on Covenants for Title, 5th ed., sec. 128, sub-sec. 2, note 1.

The question then is: Did the defendant interrupt or disturb the lessee in its peaceable possession and enjoyment.

of the premises? At the hearing it seemed to me that the acts here done must be held to be a breach of such covenant, and I have been able to find an authority which seems to me to be express upon the point. I refer to *Edge v. Boileau* (1885), 16 Q. B. D. 117, where there was a covenant for quiet enjoyment, providing that upon the observance of covenants, etc., the tenant "should peaceably and quietly hold and enjoy the said premises without interruption from the lessors or persons claiming through them." There, the plaintiff's rent being in arrear and the premises being out of repair, the defendants' agent, by their authority, served notice in writing on the plaintiff's sub-tenants of the demised premises requiring them not to pay to the plaintiff any rent due or thereafter to become due to him, but to pay the same to the defendants, and threatening legal proceedings in default of compliance with the notice. The plaintiff, having paid the rent in arrear, requested the defendants to withdraw the notices, complaining that they would occasion him great difficulty in obtaining his rents from his sub-tenants, but the defendants refused to do so because the plaintiff had not executed certain repairs which they required him to do. The defendants, however, ultimately, after an interval of about two months, withdrew the notices. In the meantime one of the plaintiff's sub-tenants paid his rent to the defendants. The plaintiff brought his action as above mentioned, alleging loss of rent and damage to the value of his property, by reason of his title being impugned. There was a verdict for the plaintiff for £100 damages and a motion for a new trial or to enter judgment for the defendants. In argument counsel for the defendants urged as follows: "The notice given by the defendants does not amount to a breach of the covenant for quiet enjoyment. There was no physical interference, either actual or constructive, with the plaintiff's enjoyment. The plaintiff's tenants were legally liable to pay their rents, and could be compelled to do so; and the notice was a mere nullity and idle threat." The judgment of the Court, composed of Pollock, B., and Manisty,

Judgment.

Rose, J.

Judgment. J., was for the plaintiff, refusing the motion. After referring
Rose, J. to the facts, Pollock, B., said : "To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the property demised." It will be observed that the learned Baron used the word "disturbance," although that word is not found in the covenant as set out in the report, and counsel for the defendants in their argument stated : "The meaning of the covenant is that the plaintiff shall not be disturbed in possession. There was no disturbance of his possession, inasmuch as he could at any moment have compelled his tenants to pay." Pollock, B., in his judgment, referred to the only case cited on the point, namely, *Witchcot v. Nine* (1612), Brownl. & Gold. 81, where it was held that telling a tenant not to pay his rent is not necessarily a breach of the covenant for quiet enjoyment, and added : "There is nothing said as to the circumstances under which the man was told not to pay his rent, and it appears that he did pay his rent notwithstanding the notice. I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat and as not amounting to a breach of the covenant for quiet enjoyment, because there was no substantial interference with the enjoyment. Here I think that there is a substantial interference with the rights of the plaintiff, and one which might very well seriously affect the value of his property."

Here, the defendant, misconceiving his rights, as I have found, served notice upon the plaintiff company requiring it to vacate the premises. He cannot object to the company relying upon the validity of the notice. True, the letter of the 29th January, addressed by the plaintiff to the defendant, shews that the officers of the plaintiff company were not satisfied that the defendant was stating the fact, but, as is said in such letter, "we have no option in the matter, as you have sold the property." If the defendant had sold the property as he stated, the plaintiff had no option. Apparently in response to an inquiry, the letter of the 22nd January was written by the defendant, stating

that he had sold the property. This then was a demand of possession or a notice to quit based upon an alleged state of facts which, if existent, would entitle the defendant to possession. The defendant, if I am correct in the view I have formed, had no right to give this notice. I think he equally has no right to complain that the plaintiff acted upon the notice without waiting for an action to be brought. If an action had been brought to recover possession, would it have been contended that there had not been a disturbance of the peaceable possession and enjoyment of the premises by the plaintiff? Is that possession and enjoyment any the less disturbed because the plaintiff accepts and acts upon a notice which apparently is valid, and which the defendant asserts is valid? I cannot distinguish this case from that of *Edge v. Boileau*, and think there must be recovery by the plaintiff. I refer to the cases collected in *Redman & Lyon, supra*, pp. 140, 141, and : 142; *Platt on Leases*, vol. 2, pp. 288-9.

Judgment.

Rose, J.

It was urged that the agreement which the plaintiff obtained from the defendant was an acquiescence by the plaintiff in the defendant's demand and an answer to the plaintiff's claim. I do not think so. The plaintiff went out under protest, and going out earlier than the day named in the notice to quit merely lessened the damages: see *Cowling v. Dickson* (1880), 45 U. C. R. 94, 5 A. R. 549, *supra*.

The damages must be ascertained upon a reference, as the parties thought it would be inconvenient to have me assess them.

The principle upon which the damages are to be assessed seems to be the same as in the case of an eviction. I refer to *Redman & Lyon*, p. 144; *Williams v. Burrell* (1845), 1 C. B. 402; *Mayne on Damages*, 4th ed., p. 198.

The pleadings may be amended to set up a claim for breach of covenant for quiet enjoyment.

The plaintiff must have his costs up to and including the trial. Further directions and costs reserved.

E. B. B.

WARREN V. VANNORMAN.

Way—Right of—Prescription—Termini—Slight Deviations—Interruptions.

The *termini a quo* and *ad quem* of a way over the defendant's land used and enjoyed as of right by the plaintiff and his predecessors in title for upwards of twenty years before the commencement of the action had not varied during that period, except at two points, where, about fourteen years before action, one of the plaintiff's predecessors slightly altered the line of the way for the purpose of going round muddy spots, and the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way:—

Held, that they did not operate to do away with the plaintiff's right to claim the way between the termini, that way having been substantially used during the whole period; but the plaintiff should be confined either to the original or substituted line.

Slight temporary interruptions by the defendant were insufficient to prevent the statute from running.

Statement.

THIS was an action for a declaration that the plaintiff had acquired, by prescription, a right of way over the Middleton road, in the townships of Lansdowne and Leeds, across the south-east corner of that part of the east half of lot 24 in the 6th concession of the township of Leeds lying north of the Sand Bay road; or in the alternative for a declaration that the way so claimed by the plaintiff was a public way; and for an order upon the defendant to remove the fence placed by him across the way and all obstructions to the use thereof; and for an injunction restraining the defendant from interfering with the plaintiff's use of the way; and for \$200 damages.

The interruptions referred to in the judgment, *infra*, were as follows:—About fifteen months before the commencement of the action, the defendant erected gate posts at the junction of the right of way with the Sand Bay road, and put up bars between them. The plaintiff threw down these bars and left them down every time they came to his notice. He did not reside on the dominant tenement at that time, nor did any one holding under him. The defendant followed up this interruption by continuing the wire fence along the Sand Bay road across the termi-

nus of the right of way where it adjoined the road. The plaintiff cut the wires and threw them away, leaving the approach open as before. The defendant then constructed a solid barricade of rock and timber across the entrance to the right of way. This the plaintiff did not attempt to remove, but commenced his action. There was, also, uncontradicted evidence to shew that on one occasion the plaintiff did pass through the gateway, taking down the bars, and being present while his companion put them up again. Statement.

The other facts are sufficiently stated in the judgment.

The action was tried before STREET, J., without a jury, at Brockville, on the 18th November, 1897.

J. A. Hutcheson and A. A. Fisher, for the plaintiff.

Britton, Q. C., and W. B. Carroll, for the defendant.

January 6, 1898. STREET, J.:—

I am of opinion that the evidence shewed that the plaintiff and his predecessors in title have for upwards of twenty years before the commencement of this action used and enjoyed as of right a way for themselves, their servants, horses and waggons, over the easterly part of lot 24 in the 6th concession of Leeds, for the purpose of going to and fro between the plaintiff's lot A. in the 6th concession of Lansdowne and the Sand Bay road. The direction of the way is governed to a very large extent by the nature of the ground, and is laid down upon the plan filed at the trial. The *termini a quo* and *ad quem* have not varied during the period of twenty years, although prior to that time the terminus on the Sand Bay road was somewhat further to the west. During that period the persons using the way have not always used the precise track now used, throughout its whole length: at two points the evidence shews that about fourteen years ago one Snider, who then occupied the plaintiff's land, slightly altered the line of the road for the purpose of going round muddy spots, and the

Judgment. user of the original line at these two points seems to have
Street, J. been abandoned for the substituted one. These alterations, however, were very short as compared with the length of the way, and I can find no authority for the contention that they operate to do away with the plaintiff's right to claim the way between the termini, that way having been, as I find, substantially used during the whole period: *Wimbledon, etc., Conservators v. Dixon* (1875), 1 Ch. D. 362; *Gale on Easements*, 6th ed., p. 327; *Rouse v. Bardin* (1790), 1 H. Bl. 351; *Payne v. Shedden* (1834), 1 M. & R. 382.

The interruptions of the defendant were clearly insufficient to prevent the statute from running: *Carr v. Foster* (1842), 3 Q. B. 581; *Flight v. Thomas* (1834), 11 A. & E. 688.

In my opinion, the plaintiff must have judgment declaring his right to the way between the termini, with his costs of the action. In settling the judgment, the limits of the way may be ascertained, and the plaintiff may be required by the defendant to confine himself to the track as originally used, or with the deviations referred to above.

E. B. B.

[DIVISIONAL COURT.]

HEATON V. FLOOD.

Chattel Mortgage—Omission to Renew—Mortgagee Taking Possession—Sufficiency of—Seizure by Execution Creditor—57 Vict. ch. 37, secs. 38-40 (O.).

A mortgagee having omitted to renew a chattel mortgage, delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining premises, taking from them an instrument under seal whereby they acknowledged that they had received the goods under and by virtue of the warrant from him, and undertook to deliver them to him on demand. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question :—

Held, that what had taken place did not constitute such a taking of possession as is required by the statute.

Per MEREDITH, C.J.—In any event, the act of taking possession after the time for renewal has expired must amount to a new delivery or new transfer by the mortgagor.

Per MEREDITH, C.J., also.—A creditor, prior to the placing of his execution in the sheriff's hands, has no *locus standi* to attack a mortgage invalid for want of renewal.

Clarkson v. McMaster (1895), 25 S. C. R. 96, commented on.

Per MEREDITH, C.J., also.—Sections 38 and 40 of 57 Vict. ch. 37 (O.), do not apply to a mortgage which has ceased to be valid for want of renewal.

THIS was an appeal by the plaintiffs, the claimants in *Statement*. an interpleader issue, tried by the senior Judge of the County Court of the county of Kent, from the learned Judge's decision in favour of the respondent, who was an execution creditor of one David P. Heaton.

Each of the plaintiffs claimed under a chattel mortgage from the execution debtor to him of the goods in question.

The appeal was argued on the 10th day of September, A.D., 1897, before a Divisional Court, composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

M. Wilson, Q.C., for the appellants.

F. A. Anglin, for the respondent.

The facts appear in the judgment of MEREDITH, C. J.

Judgment. November 20th 1897. MEREDITH, C. J.:—

Meredith,
C.J.

The learned Judge at the trial decided against the good faith of the chattel mortgage to the claimant George S. Heaton, and we intimated on the argument that we saw no reason for differing from his opinion in that regard. Further consideration of the evidence has not changed but confirmed the view we then entertained.

Different considerations, however, apply to the claim of the appellant Dougall. The chattel mortgage to him was made in good faith, and had it been renewed in conformity with the provisions of the "Bills of Sale and Chattel Mortgage Act, 1894," it would have been good against the execution creditors of the mortgagor. The chattel mortgage is dated the 4th of July, 1892, and was regularly renewed in the years 1893 and 1894, the last renewal being effected on the 28th of June, 1894, and it consequently ceased to be valid as against the creditors of the "person making the same and as against purchasers and mortgagees in good faith for valuable consideration," etc. (section 17), at the expiration of the year from the last renewal.

The seizure by the sheriff took place on the 31st day of July, 1895; and, unless the contention of the appellant Dougall that the proceedings taken by him shortly before the seizure operated to make good his claim to hold the goods as security for his debt as against the execution creditor is maintained, the claim of the latter must prevail against him.

The proceedings referred to were begun by a warrant, which the appellant Dougall on the 2nd July, 1895, issued to his bailiff, F. A. Mailloux, directing him to seize the goods under his mortgage and to sell them to satisfy the debt secured by it; Mailloux under this warrant made a seizure of the goods on the premises where they were found, and left them on the same premises, taking from George Heaton, a son of the execution debtor, who lived with the latter, as a member of his household, and Elias Richardson (a son-in-law of the execution debtor), who

resided on the adjoining farm, an instrument under their hands and seals by which they acknowledged to have received from Mailloux the goods "under and by virtue of a warrant of distress under a chattel mortgage made by David P. Heaton to D. Dougall," and by which they undertook to deliver the goods to Mailloux whenever demanded in as good condition as they were then in, under a penalty of \$250.

Judgment.
Meredith,
C.J.

Much of the evidence was directed to the question whether after the seizure by Mailloux the goods remained as before it in the possession or under the control of the mortgagor or whether the custody and control of them were transferred to George Heaton and Richardson; and the evidence is somewhat conflicting. The argument before us turned mainly upon the proper conclusion to be drawn from the evidence as to the fact of the taking of possession and the nature of it, and the effect of it in law upon Dougall's rights under his mortgage.

The learned Judge of the County Court did not decide this question, and he does not state exactly what the ground was upon which he proceeded; if it was that, apart from the provisions of section 38 of the Act, 57 Vic. ch 37, (O),* the respondent as a creditor had a *locus standi* to attack the mortgage even before he had placed his execution in the hands of the sheriff, that ground was, I think, not open but concluded against the respondent by authority binding upon the learned Judge and upon us notwithstanding the view expressed by the learned Chief Justice of the Supreme Court in *Clarkson v. McMaster* (1895), 25 S. C. R. 96, though no doubt open for consideration by the Supreme

* 38. In the application of this Act the words "void as against creditors" where they occur, shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee in insolvency of the mortgagor, and to an assignee for the general benefit of creditors, within the meaning of the Act respecting Assignments and Preferences by Insolvent Persons and amendments thereto, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer.

Judgment. Court; and if the learned Judge proceeded upon the ground
Meredith, that section 38 applied, I think his view was erroneous
C.J. because in my opinion the declaratory provisions of that section have no application to the case of a mortgage which has ceased to be valid for want of renewal.

Whatever may have been the intention of the Legislature, in enacting the provisions which are now contained in section 38, it has used language which cannot, in my opinion, be properly applied to such a mortgage; the section interprets certain words which are to be found in the Act "void as against creditors"; these words occur in sections 5 and 6, which deal with the original registration, and section 13, which deals with registration where the mortgaged goods have been permanently removed from the county or district in which they were when the mortgage was executed, but they do not occur in the sections dealing with the renewal of mortgages, and therefore the words used in the latter sections "cease to be valid" must be interpreted without the aid of any definition given to them by the Act.

It was urged by the respondent's counsel that section 40* applied, and that it prevents the taking of possession by the mortgagee operating to make valid the mortgage as against the respondent, he being, as he undoubtedly is, a creditor who became such before the taking of possession.

I am of opinion, however, that section 40 does not apply. Its provisions are in terms limited "to a mortgage or sale declared by this Act to be void as against creditors, etc." Even if a declaration that the mortgage is to cease to be valid be otherwise the equivalent of a declaration that the mortgage shall be void, which is, I think, open to question, it is to be observed that a mortgage made null and void

*40. A mortgage or sale declared by this Act to be void as against creditors and subsequent purchasers or mortgagees shall not by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee be thereby made valid as against persons who become creditors or purchasers, or mortgagees before such taking of possession.

for want of registration is void *ab initio* as against the classes of persons which the Act mentions; but where it "ceases to be valid" for want of renewal, the invalidating does not relate back so as to make the mortgage void *ab initio*; and it cannot, therefore, be said that the Act has in the latter case, declared the mortgage to be void; and again the word "subsequent" as applied to purchasers or mortgagees must be referable to the time of the execution of the mortgage and the section applicable only to a mortgage which is declared to be void as against purchasers and mortgagees subsequent to it, while a mortgage which has ceased to be valid for want of renewal is according to the decision of the Court of Appeal in *Hodgins v. Johnston* (1880), 5 A. R. 449, invalid only as against purchasers and mortgagees subsequent to the period when the renewal ought to have been effected, and valid as against purchasers and mortgagees who may have acquired their rights while the mortgage had validity.

Judgment.
Meredith,
C.J.

If I am right in thinking that sections 38 and 40 do not apply, there remains for consideration the question whether the contention of the appellant Dougall as to his having taken possession and the effect of it, having regard to the other provisions of the Act and the decisions upon them, is well founded. That contention was that although the mortgage, owing to his having failed to renew it, ceased to be valid as against the creditors of the mortgagor and subsequent purchasers and mortgagees at the expiration of a year from the last renewal of it, he had before the seizure by the sheriff under the respondent's execution, taken possession of the goods comprised in his mortgage, and that his title to them was thereby validated and should prevail against the claim of the respondents.

Looking at the question, apart from authority, I am unable to understand how the taking of possession by the mortgagee under a mortgage, which has ceased to be valid as against a creditor, of the goods comprised in the mortgage can render it valid as against the creditor, even though the possession be taken before seizure under process

Judgment. at the suit of the creditor. The mortgagee, though in
Meredith, possession, is still mortgagee and must claim as such under
C.J. an instrument which the statute declares to have ceased to be valid as against the creditor; and how without violating the explicit declaration of the Legislature can a Court hold that to be valid which the Legislature has declared to have ceased to be valid?

It was argued by the appellant's counsel that the law was settled by decisions binding on us in accordance with his contention, that the possession of the mortgagee to be effectual as against the execution creditor need not be "an actual and continued change of possession" as required by section 39,* and that what would be a sufficient possession at common law is all that is required; but in none of the cases in which the question has arisen, except the case of *Gillard v. Bollert* (1893), 24 O. R. 147, has it been so determined, nor were we referred to, nor have I been able to discover any case in which what was decided is opposed to the view that the possession to be effectual must be such as would be required under the Act to prevent a mortgage or conveyance being null and void as against creditors, purchasers and mortgagees where it is not registered in accordance with the provisions of the Act.

It has unquestionably in many cases been laid down, or stated or assumed, that the taking of possession under a mortgage, which has not been registered in conformity with the provisions of the Act, by the mortgagee before the intervention of the creditor would operate to validate the mortgage as against the creditor; but in none of these cases has it been necessary to determine or has it been decided what the nature of the possession must be in order that it shall have that effect, and there is no case, except *Gillard v. Bollert*, in which what was decided is opposed to the view of the late Mr. Justice Patterson expressed first in *Parkes v. St. George* (1884),

* 39. The "actual and continued change of possession" mentioned in this Act, shall be taken to be such change of possession as is open and reasonably sufficient to afford public notice thereof.

10 A. R. 496, at p. 535, and repeated in *Smith v. Fair* (1885), 11 A. R. 735, at p. 758, that the remedial effect of delivery of possession depended on the act of the mortgagor, and that a mortgagee taking possession by virtue of his mortgage without any act amounting to a new delivery or new transfer by the mortgagor, would still hold merely under the defective conveyance which had not been accompanied by an immediate delivery and followed by an actual and continued change of possession.

Judgment.
Meredith,
C.J.

The present Chief Justice of Ontario differed from the view of Mr. Justice Patterson as to the remedial effect of the delivery of possession depending on the act of the mortgagor, and expressed the opinion that the taking of possession by the mortgagee without any additional act of the mortgagor was sufficient: *Parkes v. St. George*, p. 518 *et seq.*; *Smith v. Fair*, p. 756; though in the latter case he added that he was quite free to admit that there was ample room for a difference of opinion on the subject. There is nothing, however, to indicate that the learned Chief Justice differed except as to that from Mr. Justice Patterson's statement as to the nature of the possession requisite to validate the claim of the mortgagee, and I gather from his observations in the recent case of *Meharg v. Lumbers* (1896), 23 A. R. 51, at p. 62, that if the same question were again presented for adjudication, his views might be found now to accord with those from which he then differed.

In *Smith v. Fair*, at p. 764, Mr. Justice Osler is reported as saying, "If the mortgage was invalid merely because it did not comply with the formalities required by the Chattel Mortgage Act, R. S. O. ch. 125, I think we have already decided in *Parkes v. St. George* (1884), 10 A. R. 406, that if the mortgagee takes possession of the goods before a creditor is in a position to seize them, his title cannot be impeached." Nothing, however, was said by the learned Judge as to the nature of the possession requisite, nor was it necessary in *Parkes v. St. George*, to consider that question, because there was in that case an actual and con-

Judgment.
Meredith,
C.J.

tinued change of possession such as the Act requires from the time when the mortgagee took possession.

In *Meriden v. Braden* (1894), 21 A. R. 352, the mortgagee had taken possession of the goods and sold them to a purchaser before the creditor's execution was placed in the sheriff's hands, and it was decided that the title of the purchaser was good against the execution creditor, the ground of the decision being that when the creditor was in a position to attack the transaction the title no longer depended on the mortgage or the mortgagee's possession, but on the sale to the purchaser which being good and valid when made was not open to attack when the creditor obtained his execution, and was for the first time, as was held, in a position to set up the invalidity of the mortgage as against him. How far the authority of this case is, if at all, affected by the decision of the Supreme Court in *Clarkson v. McMaster* (1895), 25 S. C. R. 96, it is unnecessary for the purpose of the present inquiry to consider, but even if still an authority it does not in my opinion assist the appellant Dougall; it by no means follows that because where the mortgagee takes possession and sells the goods the transaction is no longer open to attack by the creditor, that that is the position of the mortgagee where he has only taken possession and must therefore claim title under his mortgage. It may well be, as was said in *Cookson v. Swire* (1884), 9 App. Cas. 653, that on such a state of facts as existed in *Meriden v. Braden*, the sale having been made with the concurrence of the mortgagor the operation of the mortgage is spent and the purchaser claims no longer under the invalid mortgage, but under his title derived from the purchase from mortgagor and mortgagee.

The view which I have ventured to express, accords with the opinion of the learned Chancellor as stated by him in *Barker v. Leeson* (1882), 1 O. R. 114, though that opinion is somewhat modified in *Banks v. Robinson* (1888), 15 O. R. 618, at p. 623-24, with the opinion of the Chief Justice of the Supreme Court, as I gather from the report of his judgment in *Clarkson v. McMaster*; and such also was the

view entertained by the Court of Queen's Bench as long ago as 1852, when *Frazer v. Lazier* (1853), 9 U. C. R. 680, was decided; and it finds support in the able judgments delivered in *Roe v. Meding* (1895), 53 New Jersey Equity Reports 350, where the question arose upon an Act of the Legislature of New Jersey, the provisions of which were, so far as they affect this question, substantially the same as those of our Act.

Judgment.
Meredith,
C.J.

Cookson v. Swire (1884), 9 App. Cas. 653, already referred to, was relied on by the appellant's counsel; but, as Mr. Justice Patterson pointed out in *Smith v. Fair*, p. 758, the provisions of the Act upon which the question in that case arose differ widely from the provisions of our Act. The English Act made the bill of sale null and void not as against creditors, purchasers and mortgagees, as our Act does, but only, as far as regards executions or the like process, as against sheriffs' officers and others seizing the property in the execution of any process of a Court authorizing a seizure of the goods of the person by whom or of whose goods the bill of sale was made and against every person on whose behalf the process issued, and as to them *only as to property which was at the time of the executing of the process*, and after the twenty-one days allowed for registration, *in the possession or apparent possession of the person making the bill of sale or against whom the process issued under or in the execution of which the bill of sale was given.*

All that under such an Act it was necessary for the grantee to do, to save his title under the bill of sale as against an execution creditor of the grantor, was to take care that when the process came to be executed the chattels were not in the possession or apparent possession of the persons whom the Act mentions; but under our Act, the mortgage or conveyance unless registered is null and void as against the creditors, if there is not an immediate delivery followed by an actual and continued change of possession.

Section 40 of the Act was no doubt passed in consequence of the views expressed in the cases to which I have

Judgment.
Meredith,
C.J.

referred and other cases; but it does not, I think, amount to a legislative declaration that the existing law is that the effect of the mere taking of possession is to validate the void mortgage or sale as against creditors, purchasers or mortgagees (Maxwell on Statutes, 3rd ed., p. 440); still less is it a legislative declaration that the taking of such possession as the appellant's counsel contended was sufficient is effectual for that purpose.

I come then to the conclusion that the possession to be taken to entitle a mortgagee to hold the goods comprised in his mortgage which has ceased to be valid as against creditors for want of renewal must be such as Mr. Justice Patterson mentions in the cases of *Parke v. St. George*, and *Smith v. Fair*, and that nothing short of that will suffice.

Having fully considered the evidence, I am of opinion that it falls very far short of shewing such a taking of possession by Dougall as in my view was necessary, and I very much doubt whether it establishes any actual change of possession at all or anything more than a mere formal delivery to George Heaton and Richardson, without any real change of the possession being intended or effected.

The execution debtor was examined as a witness for the appellant, and among the many statements made by him which throw light on the real condition of matters, I may refer to the following taken from the shorthand notes of his evidence: "Q. When the sheriff came there, there was no apparent change in the condition of things? A. No, sir. Q. Things went on just as they had before Mailloux seized? A. Yes, sir. Q. Well, what did he say when he seized? A. Well, he seized and he looked at the things and he looked at what was there and he left them with me. Q. Just where they were? A. Yes, sir. Q. Why did you ask him (George) to sign or Richardson to sign? A. For to keep the things there until Dougall or George would settle the business up. Q. To keep the things right where they were so that you could have the use of them? A. Yes, so I could have the use of them. I

could have paid both of them if they had left them with me. Q. What did he say about taking a bond? A. He just left the things where they were and then took a bond to keep them there until he came. Q. There was no apparent change of possession? A. No, of course there was not; they were right there with both me and George. Q. Just where they were before? A. Just where they stood. Q. You used the things just as you had used them before? A. Yes.

Judgment.
Meredith,
C.J.

This witness was undoubtedly anxious to assist by his evidence the case of the appellant who cannot, we think, complain if his case is put by us where the witness's evidence seems to us to leave it.

A point was endeavoured to be made as to the removal of the cattle to Richardson's farm and the storing of some of the grain after it was threshed under lock and key in his granary but neither circumstance assists the appellants in view of the fact that the cattle were before the seizure by Mailloux pastured upon the lands of George, and that there were no line fences between the lands of the three parties, and that the cattle were in the habit of going from one place to the other of their own will, and the fact that the removal of the grain is shewn by the evidence of the mortgagor to have taken place after the seizure by the sheriff.

The result is that the appellant's case fails and the judgment appealed from must be affirmed with costs.

ROSE, J.:—

I agree as to both mortgages. As to the Dougall mortgage I prefer to rest my judgment on the ground that there was no such taking of possession as is required by the statute.

MACMAHON, J.:—

I agree in the result.

G. F. H.

[DIVISIONAL COURT.]

LEIZERT V. THE CORPORATION OF THE TOWNSHIP OF
MATILDA.

Municipal Corporations—Injury from Non-repair of Highway—Notice of Accident—Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1—57 Vict. ch. 50, sec. 13 (O.)—59 Vict. ch. 51, sec. 20 (O.).

The provisions of sec. 531, sub-sec. 1, of the Consolidated Municipal Act, 1892, amended by 57 Vict. ch. 50, sec. 13, and re-amended by 59 Vict. ch. 51, sec. 20, as to the notice requisite to be given to municipal corporations in order to hold them liable for accidents arising from non-repair of highways, are applicable only to actions brought against such corporations singly, and not to actions brought against two or more jointly, as in this case, against a township and an incorporated village, where the plaintiff might fail against one corporation by reason of want of notice to it, and yet be entitled to recover against the other, it having had due notice.

Statement. THIS was an action brought by Alexander Leizert against the corporation of the township of Matilda and of the village of Iroquois, to recover damages for injuries sustained by reason of the non-repair, through the negligence of the defendants, of the township boundary line, highway, or public road, on the west side of the village of Iroquois, in the first concession, first range, of the township of Matilda. As alleged in the statement of claim, the right front wheel of the vehicle in which the plaintiff was driving dropped into a hole in the road, and the plaintiff was thrown out, and the horse ran away, and was injured, and the vehicle broken.

The plaintiff alleged that due notice of the accident had been given to the defendants, who, however, in separate defences, denied that proper notice under the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 531 (O.), as amended by 57 Vict. ch. 50, sec. 13 (O.), and 59 Vict. ch. 51, sec. 20 (O.), had been given to the corporation of the village of Iroquois, and on this ground both claimed to be discharged from all liability.

The action came on for trial on October 13th, 1897, before FERGUSON, J., at Cornwall, who dismissed the action with costs, delivering judgment as follows:—

FERGUSON, J.:—

Judgment.

Ferguson, J.

The action is brought against both defendants manifestly under the provisions of sub-sec. 7 of sec. 531 of the Act of 1892, 55 Vict. ch. 42 (O.). The plaintiff was obliged to sue, and professedly has sued both corporations. It is, however, admitted that the defendant the village (Iroquois), was not given the required notice within the seven days, though within the thirty days notice was given to each of the defendants. There is now no power to excuse the want of notice, and I am not asked to do this. The action cannot be maintained against the village; this seems to me clear. The effect seems to be the same as if the village had not been sued at all, in which case the plaintiff would not have brought his action as positively required by the statute. Again, although the defendants may be considered tortfeasors yet the statute provides for contribution between them and that the rights and liabilities of the defendants *inter se* shall be worked out in the plaintiff's action by the Court. It follows, as I think, that the plaintiff, by neglecting to give the proper notice to the village, has deprived the township of the right to such contribution in case the plaintiff should succeed and recover damages against the township. I am unable to adopt the contention so ably put forward, that when the action is against defendants jointly no notice is necessary except that required by the statute of 1894, that is a notice within the thirty days. The plaintiff has not brought his action in a proper and effective manner against both defendants as required in such cases, and I am of the opinion that the action cannot be sustained. The objection taken by the defence must, I think, prevail, and there will be a non-suit, which is now a judgment for the defendants. Judgment for the defendants with costs. Stay of proceedings for two weeks.

Counsel now concede that the notice given within the thirty days was given on the 27th of May, twenty days after the accident, and was in all respects a sufficient

Judgment. notice had it been given in good time to the village. I am
Ferguson, J. asked to mention this in addition to what I have said.

The plaintiff, on December 6th, 1897, moved before the Divisional Court, consisting of ARMOUR, C. J., and FALCONBRIDGE, J., by way of appeal.

J. Hilliard, for the plaintiff, contended that the case of a joint action is not provided for by 59 Vict. ch. 51, sec. 20, (O.); that either no notice was required, or that the Act of 1894, 57 Vict. ch. 50, sec. 13 (O.), prevailed; that 59 Vict. ch. 51, sec. 20, should not be construed as repealing 57 Vict. ch. 50, sec. 13, repeal by implication never being favoured; and that on any construction notice was served in time as against the township of Matilda, and the plaintiff should be entitled to recover against it either for all the damages, or for such part as the township would ultimately be liable for under sub-sec. 7 of sec. 531 of the Consolidated Municipal Act, 1892, when the matter of contribution was settled between the two defendants. He cited *Hughes v. The Chester and Holyhead R. W. Co.* (1861), 31 L. J. Ch., at p. 109; *Longbottom v. The Corporation of the City of Toronto* (1896), 27 O. R. 199; *Clark v. Wallond* (1883), 52 L. J. Q. B. 321; *Minet v. Leman* (1855), 20 Beav., at p. 278; *Taylor v. The Corporation of Oldham* (1876), 4 Ch. D., at p. 410; *Dobbs v. The Grand Junction Waterworks Co.* (1882), 9 Q. B. D., at p. 158; *Liney v. Rose* (1866), 17 C. P. 186; *Underhill v. Longridge* (1859), 29 L. J. (M. C.) 65; Maxwell on Statutes, 2nd ed., at p. 13.

William Johnston, for the defendants, contended that under sub-sec. 7, sec. 531 of the Consolidated Municipal Act, 1892, the action had to be against both municipalities; that it was not a question of 59 Vict. ch. 51, sec. 20, repealing 57 Vict. ch. 50, sec. 13; it simply contained a further provision limiting the rights of a plaintiff, and requiring notice to be served within seven days in case of an incorporated village.

The judgment of the Court was delivered on December 14th, 1897, by

Judgment.
Armour, C.J.

ARMOUR, C. J. :—

By sec. 531, sub-sec. 1 of the Consolidated Municipal Act, 1892, it is provided that every public road, street, bridge and highway, shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

And by sub-sec. 7 it is provided that where two or more municipalities are jointly liable for the keeping in repair of a public road, street, bridge or highway, there shall be contribution between them as to the damages sustained by any person by reason of their default in keeping the same in repair and if an action shall be brought by any such person the same shall be brought against all of such municipalities, and any of the defendants in any such action may require that the proportions in which such damages and the costs of the action shall be borne between them shall be determined therein, and in settling such proportions, either in the action or otherwise, regard shall be had to the extent to which each municipality was responsible, either primarily or otherwise, for the act or omission for which the damages shall become payable or be recovered and the damages and costs shall be apportioned between them accordingly.

By the Act 57 Vict. ch. 50, sec. 13, sub-sec. 1 of sec. 531 of the said Act is amended by adding at the end thereof the following proviso: " Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation, and provided also, that no action shall be brought to enforce a

Judgment. claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served upon or mailed through the post office to the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of the person by whom the damages have been sustained the want of notice shall be no bar to the maintenance of the action, nor in other cases shall the want or insufficiency of the notice be a bar to the action if the Court or Judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence."

By the Act 59 Vict. ch. 51, sec. 20, sub-sec. 1 of sec. 531 of the said Act as amended by sec. 13 of The Municipal Amendment Act, 1894, is further amended by adding therein immediately after the word "accident" in the twelfth line of said sec. 13, the words: "when the action is against a township and within seven days when the action is against a city, town or incorporated village," and by striking out of said sec. 13 all the words thereof after the words "maintenance of the action" where they appear in the fourteenth line thereof.

The proviso to sub-sec. 1 of sec. 531 of the Consolidated Municipal Act, 1892, therefore, now is as follows: Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served upon or mailed through the post office to the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident when the action is against a township, and within seven days when the action is against a city, town or incorporated

village ; and provided also that in case of the death of the ^{Judgment.} person by whom the damages have been sustained the ^{Armour, C.J.} want of notice shall be no bar to the maintenance of the action.

I think that the provisions made for notice in this sub-section are applicable only to cases of actions brought against a township, city, town or incorporated village alone, and not to cases of actions brought against two or more of them, as, in this case, against a township and an incorporated village, jointly.

It seems quite clear that these provisions do not apply to every case of an action brought to enforce a claim for damages under this sub-section, for no such notice is required to be given in the case of such an action brought against a county.

The restricting of the application of these provisions so as to exclude counties indicates the intention of the Legislature to restrict the application of them to the simple case of an action brought against a township, city, town or incorporated village alone, and the fixing of a different limit of time within which notice is to be given in the case of a township from that which is to be given in the case of a city, town or incorporated village, is a strong indication of intention in the same direction.

The express words of these provisions do not necessarily require notice in the case of actions brought against two or more municipalities, and I do not think that we ought to extend the application of these harsh and unreasonable provisions beyond their express words.

In another form, not altering its sense, the proviso reads as follows: "And provided also that no action shall be brought to enforce a claim for damages under this sub-section against a township unless notice in writing of the accident and the cause thereof has been served, etc., within thirty days after the happening of the accident, and provided also that no action shall be brought to enforce a claim for damages under this sub-section against a city, town, or incorporated village, unless notice in writing of

Judgment. the accident and the cause thereof has been served, etc.,
Armour, C.J. within seven days after the happening of the accident."

Reading it in this way there seems no reason to hold that its provisions are applicable to the case of such an action brought against two or more municipalities.

Sub-sec. 7 of sec. 531 of the said Act was passed to meet the injustice resulting from the law not allowing contribution between co-tortfeasors: see *Township of Sombra v. Township of Moore* (1892), 19 A. R. 144; and in the case of two or more municipalities jointly liable for the keeping in repair of a public road, street, bridge or highway, it provides that there shall be contribution between them as to the damages sustained by any person by reason of their default in keeping the same in repair.

This right to contribution is an absolute right given by the statute and is not limited to the case of an action having been brought by a person who has sustained damages by reason of their default, for the proportion which each is to bear is to be settled "either in the action or otherwise," and the claim of the person who has sustained damages might be settled without suit and still the right to contribution exist.

And in this case I do not think that it was any defence to the action by the township of Matilda, which received due notice of the accident and the cause thereof, that the village of Iroquois had not received due notice of it for the right to contribution of the township of Matilda from the village of Iroquois did not depend upon such notice having been given to the village of Iroquois but existed independently of it.

The cause of action is still a several one as regards each corporation, although the statute requires that both shall be joined in the action, and although the plaintiff might have failed against the village of Iroquois by reason of want of notice to that corporation he might still be entitled, notwithstanding such failure against the village of Iroquois, to recover against the township of Matilda, which had due notice.

The non-suit must be set aside and a new trial had Judgment.
between the parties, and the costs of the last trial and of Armour, C.J.
this motion must be paid by the defendants immediately
after the taxation thereof.

A. H. F. L.

[DIVISIONAL COURT.]

FITZGERALD ET AL. V. MOLSONS BANK ET AL.

*Municipal Corporations — Borrowing Powers — Current Expenditure —
Inquiry by Lender—56 Vict. ch. 35, sec. 10 (O.)—Repayment of Money
Lent.*

Under sec. 413 of the Municipal Act, 55 Vict. ch. 42 (O.), as amended by 56 Vict. ch. 35, sec. 10, a lender is bound to inquire into the amount of taxes authorized to be levied by a municipality to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing.

A municipal council may, however, with the consent of the ratepayers, raise money by debentures to repay money so unlawfully borrowed, when the expenditure, although not included in the estimates, was for purposes within the general powers of the corporation.

THIS was an action brought by certain ratepayers of the Statement.
village of Hintonburgh against the Molsons Bank, the corporation of the village, and the sheriff of the county of Carleton, to restrain the collection and enforcement of a judgment recovered by the bank against the village corporation under the following circumstances:—

On the 23rd August, 1895, the council of the village, by by-law No. 49, passed under the authority of sec. 413 of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42, as amended by sec. 10 of the Municipal Amendment Act of 1893, 56 Vict. ch. 35 (O.), authorized the reeve and treasurer to borrow from the Molsons Bank at Ottawa sums not exceeding in all \$5,000, to meet current expenditure until such time as the taxes levied therefor could be collected.

Statement. At the same meeting they passed by-law No. 50 authorizing the levying of the rates for the year. The amounts to be levied for each separate purpose were left separate in the by-law, and amounted in the whole to \$5,179.45, of which only \$1,200 was for village rate, \$2,775 was for school rates, \$825 for debts under former debentures, and the balance for county rate.

By-law No. 49 was amended by by-law No. 56, on 29th November, 1895, by substituting \$7,000 for \$5,000 as the amount to be borrowed.

Under these by-laws the reeve and treasurer borrowed from the Molsons Bank at Ottawa \$6,000, giving the notes of the village corporation therefor, as authorized by the by-laws.

The amount so borrowed was expended in the repair and alteration of certain roads, and in diverting the course of a certain stream, within the corporation. These works were within the general powers of the corporation, but no provision had been made for the outlay in the estimates for the year.

The bank at the time of the advances had no notice that the money borrowed was not required to meet current expenditure, but they might by inquiry have ascertained that the taxes levied for village purposes were greatly below the amount borrowed under the by-law.

The notes given to the bank were not paid at maturity and were renewed, and the renewals not having been paid, the bank in October, 1896, brought an action against the village corporation and obtained judgment by default for \$6,201.04, the amount of the notes and interest, and placed execution in the hands of the sheriff of the county.

On the 23rd January, 1897, the plaintiffs, who were ratepayers of the village, began this action, on behalf of themselves and the other ratepayers, to declare the by-laws 50 and 56 to be *ultra vires* the corporation and void, also to declare the judgment obtained by the bank to be void by reason of fraud and collusion between the bank and the council, and to restrain the sheriff from levying under the execution issued upon it.

After the issue of the writ in this action, and before the **Statement.** filing of the statement of claim, viz., on 16th February, 1897, the village council submitted to the ratepayers a by-law authorizing the issue of debentures to the amount of \$8,000, reciting that the corporation had expended \$7,100 in the opening of the roads in question and the diverting of the stream in question, and that a further sum of \$900 was required for the further improvement of one of the roads in question. The expenditure here recited included that which had been made out of the money borrowed from the bank. This by-law was duly approved by the vote of the ratepayers, and was passed by the council, and debentures under it were issued, and the proceeds at the time of the trial remained to the credit of a special account in the bank. The plaintiffs in their statement of claim set out the passing of this by-law and alleged that the defendants the corporation intended to pay the judgment of the Molsons Bank out of the proceeds of the debentures, although that purpose was not set forth in the by-law, and prayed that they might be restrained from doing so.

The defendants the Molsons Bank in their statement of defence alleged that they advanced the moneys in question to the corporation in good faith; that they had been expended for purposes of the corporation; that the by-law of February, 1897, was passed for the express purpose of paying their claim; and that, having obtained judgment for the amount advanced, without any fraud or collusion, they were entitled to proceed upon it.

The defendants the corporation of the village by their statement of defence said that the \$6,000 principal money represented by the judgment was advanced to them by the bank; that the corporation had received the benefit of it, and had always regarded it as a just debt, and were willing to pay it, and intended to pay it if this action had not been instituted, and submitted its rights and obligations to the Court.

The defendant the sheriff justified under the judgment and execution, and submitted to the order and protection of the Court.

Statement. The action was tried before ROSE, J., without a jury at Ottawa, on the 17th September, 1897, upon the pleadings and admissions which are set forth in substance above.

After argument the learned Judge dismissed the action with costs, upon the ground that under the amended Municipal Act of 1893 the bank were exempted from inquiry into the necessity for the passing of the by-law No. 49, and that the exemption from inquiry extended to the amount authorized, even though it should exceed the amount of the taxes for the year.

The plaintiffs moved to set aside this judgment and to enter the judgment asked for in the statement of claim, and the motion was argued on the 21st January, 1898, before a Divisional Court composed of ARMOUR, C. J., and STREET, J.

J. E. O'Meara, for the plaintiff, referred to *Re Johnson and School Trustees of Harwich* (1870), 30 U. C. R. 264; *Edinburgh Life Assurance Co. v. Town of St. Catharines* (1864), 10 Gr. 379; *Foster v. Village of Hintonburgh* (1897), 28 O. R. 221; *County of Frontenac v. Town of Kingston* (1869), 20 C. P. 49; (1871), 30 U. C. R. 584; *County of Wentworth v. City of Hamilton* (1874), 34 U. C. R. 585; *Kerfoot v. Village of Watford* (1893), 24 O. R. 235.

Aylesworth, Q.C., for the defendants the Molsons Bank, cited *Armstrong v. Township of West Garafraxa* (1879), 44 U. C. R. 515; *Molsons Bank v. Town of Brockville* (1880), 31 C. P. 174.

W. R. Smyth, for the defendant Sweetland, the sheriff, cited *Anderson's Law of Execution*, p. 324; *Ex p. Streeter* (1881), 19 Ch. D. 216, 223.

January 29, 1898. The judgment of the Court was delivered by

STREET, J.:—

The whole amount of the taxes authorized to be levied in this municipality during the year 1895 was only \$5,179.12, and it is clear, therefore, that, under the most

favourable view of sec. 413 of the Municipal Act of 1892, as amended by sec. 10 of the Municipal Amendment Act of 1893, the council were not empowered to raise \$6,000 to meet their "then current expenditure until such time as the taxes levied therefor" could be collected. I cannot entirely concur in the interpretation placed by my brother Rose upon the concluding portion of the section, which provides that "the person or bank lending such amount shall not be bound to establish the necessity for borrowing the same." With great respect, I think these words are to be read in connection with the preceding portion of the section, which confers the authority to borrow "such sums as the council may deem necessary to meet the then current expenditure of the corporation until such time as the taxes levied therefor can be collected," and limits the power of borrowing under this section to the amount of the taxes levied to meet the then current expenditure. I think, therefore, that a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing that, or any other, amount.

Judgment.
Street, J.

Were the lender declared to be exempted from every inquiry, nothing would be more easy than for a council to pledge the credit of the corporation for amounts much greater than the section was intended to authorize, and the provisions confining the expenditure of each council to the taxes levied during its year, unless otherwise specially authorized by the ratepayers, would to a large extent cease to be a safeguard.

There is a later amendment to the clause in sec. 50 of ch. 45 of the Ontario statutes for 1897, further limiting the amount to be borrowed under it, which, however, does not affect this case.

It is admitted, however, that the money borrowed from the bank was expended by the council upon works within its jurisdiction, upon which money lawfully obtained for

Judgment.
Street, J.

the purposes of the council might lawfully have been expended; and it is further admitted that the ratepayers, since this action was begun, have passed a by-law authorizing the council to borrow money to pay the outlay incurred in these works; that the council have issued debentures and raised money upon them and are willing to pay back to the Molsons Bank the money borrowed under sec. 413, and are only restrained from doing so by the proceedings in this action.

If the plaintiffs, upon the passing of this by-law by the ratepayers, had withdrawn their opposition to the payment of the claim of the bank, I think they would have been entitled to their costs, because they appear to me to have been right in their contentions to that point; but, instead of doing so, they have persevered in endeavouring to thwart the desire of the council to honestly repay the money which they had obtained and expended for the general benefit of the municipality. They have insisted that the council have no right to use the money raised upon these debentures in repaying the sums borrowed from the bank, because the by-law approved by the ratepayers does not specifically state that the money is to be paid to the bank.

I can see nothing in the Municipal Act which prevents a council, with the approval of the ratepayers, from raising money for the repayment of such a debt as this. It is one thing to say that money borrowed by a council without the safeguards imposed by the statute may not be recoverable by the lender. It is quite another thing to say that a municipality having so borrowed money and expended it for the benefit of the ratepayers is to be restrained from being honest enough to pay it back. This is what the plaintiffs invite us to say in the present action, and I am clear we should refuse to say it.

In my opinion, the motion should be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

RE LUCKHARDT.

Dower—Mortgaged Lands—Purchase of Equity of Redemption—Discharge of Existing Mortgage—New Mortgage—Registration—Equitable Dower—42 Vict. ch. 22 (O.)—Legal Estate—Momentary Seizin.

Although, since the passing of the Act 42 Vict. ch. 22 (O.), an Act to amend the law of dower, a married woman is entitled to dower out of an equity of redemption in land, whether her husband dies seized of it or not, where such equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower, she is not entitled to dower out of an equity of redemption purchased and sold by him in his lifetime, the legal estate never having vested in him.

Martindale v. Clarkson (1880), 6 A. R. 1, distinguished.

And where a purchaser of land subject to a mortgage paid off and procured a discharge in favour of the mortgagor, and on the same day obtained his conveyance from him, giving back a mortgage, with bar of dower, for the balance of the purchase money, all of which instruments were registered in the above order, it was *held*, ROBERTSON, J., dissenting, that the wife of such purchaser was not entitled to dower out of a surplus arising on a sale under a subsequent incumbrance, her husband never having been even momentarily seized of the legal estate in the land.

A MOTION on behalf of Michael Weicher for an order for **Statement.** payment out of Court to him of a sum of \$355.30, under the following circumstances :—

On the 3rd November, 1893, Frank Heinmann was, and for several years before had been, the owner in fee of a tavern stand on the south side of Main street, in the village of Glen Allen, being the west half of lot 8 and lots 9 and 10 ; and on that day he mortgaged the land to Henry Winger to secure \$1,200. In October, 1894, Heinmann agreed to sell and Deoder Luckhardt agreed to buy the land, free from all incumbrances, for \$4,500, to be paid and secured as follows :

(1) By a money payment of.. .. .	\$ 100
(2) By the procuring from Winger of a discharge of his mortgage for	1,200
(3) By conveying certain property in Elmira	1,200
(4) By giving a mortgage on the land in question for	2,000
	<hr/>
	\$4,500

Statement.

This bargain was carried out in the following manner :— Luckhardt satisfied the Winger mortgage and procured a statutory discharge to be executed by Winger in favour of Heinmann on the 26th October, 1894. This discharge was given to one Henderson for the purpose of having it duly registered. On the same day, Heinmann and his wife (the latter for the purpose of barring her inchoate right to dower) executed, in the statutory short form, a deed of the land in fee simple, free from all incumbrances, to Luckhardt ; and Luckhardt and his wife (the latter to bar dower) executed a mortgage to secure the balance of the purchase money. The deeds of grant and mortgage, in duplicate, were given to the same man Henderson, who was the conveyancer who drew them, for the purpose of registration. Henderson enclosed the discharge, the deed of grant, and the mortgage deed, all duly executed and attested, with affidavits of execution, in a letter to the registrar of deeds with a request that they should be registered, and on the 29th October the three instruments were registered as follows : the discharge of mortgage as No. 7664 at 10 a.m. ; the deed from Heinmann as No. 7665 at 10.02 a.m. ; and the mortgage deed as No. 7666 at 10.05 a.m. Afterwards the duplicates of the two latter instruments were returned to Henderson, who delivered them both to Heinmann, as Luckhardt had agreed that he should do.

On the 1st January, 1895, Luckhardt and his wife (the latter for the purpose of barring dower) executed another mortgage on the same property in favour of one Reising, to secure \$1,000, which was registered on the 5th January, 1895.

Default was made under both mortgages, and on the 8th March, 1897, the mortgaged lands were sold by auction under the latter mortgage, subject to the prior mortgage. For convenience of bidding, the property was put up as if unincumbered by the prior mortgage, and was knocked down at \$3,785. This sum satisfied the principal and interest due on both mortgages, and left a balance of \$375.30, which (less \$20 costs) was paid into Court under an order made on the 10th June, 1897.

The application was to have this amount paid out to Michael Weicher, who had been appointed by the Court receiver to receive the interest of Deoder Luckhardt in the proceeds of sale to apply on a judgment recovered by Weicher & Son for \$538.90 and \$25.59 costs against Luckhardt. Statement.

The motion was heard by ROSE, J., in Chambers, on the 1st October, 1897.

J. C. Haight, for the applicant.

William Davidson, for Amelia Luckhardt, the wife of Deoder Luckhardt, opposed the application, upon the ground that she, as dowress, would, in case of the death of her husband, be entitled to the amount, she having barred her inchoate right to dower only to the extent of the mortgages.

The arguments are very fully stated in the judgments printed below.

October 12, 1897. ROSE, J.:—

The simple question here to be determined is: Did the legal estate vest in the husband so as to give the wife a right to dower?

As far as necessary for the purpose of determining this question, the facts may be stated as follows:—The husband made a contract for the purchase of the lands in question, and, as part payment of the purchase money, was required to pay off the mortgage existing upon the land at the time of the purchase, to one Winger, so as to be enabled to give the vendor a first mortgage for the balance of the purchase money. The purchaser did pay off this mortgage by transferring it to another lot of land, and obtained a discharge bearing date the 26th October, 1894. On the same day he received a deed of the land from the vendor, and gave back a mortgage for the balance of the purchase money, in which mortgage his wife joined to bar dower. The deed and mortgage upon being executed were, as appears from

Judgment.
Rose, J.

the affidavits, delivered, and sent to be registered. The discharge of mortgage was also sent to be registered, and the registration was in order of time as follows:—The discharge first, the deed second, and the mortgage third.

It was argued on behalf of the wife that the deed and mortgage remained in escrow until the registration of the discharge, and the registration of the discharge operated to convey the legal estate to the husband, the purchaser of the land, and that the legal estate resting in him for a moment, the dower attached.

I cannot yield to this argument. I think I must take it as a fact, from the material before me, that the deed and the mortgage were executed and delivered without condition, and not in escrow. The vendor, no doubt, was satisfied upon being made aware of the fact that the discharge of mortgage had been signed. It was only as grantee of the land that the purchaser obtained and registered the discharge, and he was not entitled to the legal estate save for the purpose of completing the transaction so as to vest it in the vendor, as security for the unpaid purchase money. I think that what the purchaser obtained by his conveyance was the equity of redemption which at that time was all the vendor had; and the mortgage he gave back was of such equity; and the registration of the discharge subsequent to the delivery, by the operation of the statute, vested the legal estate in the vendor as mortgagee under the mortgage from the purchaser. The legal estate, therefore, was at no time in the husband, and the subsequent proceedings by which the property was sold prevent dower attaching under the statute, because the husband, of course, cannot die beneficially entitled. The wife, therefore, in my opinion, never became entitled to dower, and her claim to be paid dower out of the purchase money fails. No question arises such as was discussed in *Pratt v. Bunnell* (1891), 21 O.R. 1; *Gemmill v. Nelligan* (1895), 26 O.R. 307; and *Blong v. Fitzgerald* (1893), 15 P.R. 467.

As to the effect of the conveyances in the transaction in question, I may refer to *Nevitt v. McMurray* (1886), 14

A. R. 126, at pp. 139 *et seq.*; also to Cameron on Dower, Judgment
p. 114. Rose, J.

Amelia Luckhardt appealed from this decision, and her appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 10th November, 1897.

William Davidson, for the appellant, contended that legal dower attached, and failing that, there was dower in equity, and the money should be kept in Court during the husband's lifetime. He referred to 42 Vict. ch. 22 (O.); R. S. O., 1887, ch. 133, secs. 5, 6, 7; *Pratt v. Bunnell* (1891), 21 O. R. 1; *Gemmill v. Nelligan* (1895), 26 O. R. 307; *Trust and Loan Co. v. Covert* (1872), 32 U. C. R. 222, (1876), 1 A. R. 26, (1877), 1 S. C. R. 564; *Craig v. Templeton* (1860), 8 Gr. 483; *Re Croskery* (1888), 16 O. R. 207; *Martindale v. Clarkson* (1880), 6 A. R. 1, at p. 6, per Patterson, J.A.; *Re Hopkins* (1879), 8 P. R. 160; *Armour on Titles*, 2nd ed., p. 176.

J. C. Haight, for Weicher, cited Anson on Contracts, 8th ed., p. 52; *Xenos v. Wickham* (1867), L. R. 2 H. L. at p. 309; Addison on Contracts, 9th ed., p. 20; *Lee v. Howes* (1870), 30 U. C. R. 292; *McLennan v. McLean* (1879), 27 Gr. 54; *Re Robertson* (1877), 25 Gr. 276, 279; *Imperial Bank v. Metcalfe* (1886), 11 O. R. 467, 475; *Monk v. Benjamin* (1890), 13 P. R. 356; *Gardner v. Brown* (1890), 19 O. R. 202; *Re Robertson* (1878), 25 Gr. at pp. 488, 489; *Dawson v. Bank of Whitehaven* (1877), 6 Ch. D. 218; *Nevitt v. McMurray* (1886), 14 A. R. 126.

January 10, 1898. BOYD, C.:—

The order of Rose, J., in appeal, should be affirmed.

The main question urged before us was that taken in the notice of appeal, viz., that the appellant was entitled to inchoate dower because her husband was seized of an equitable estate in the lands. True, he was so seized, but never having anything more than an equitable estate, and

Judgment. this having been sold during his life, no right of dower
Boyd, C. can arise. On this aspect of the case I agree with the judgment of my brother Ferguson.

The language of Patterson, J. A., in *Martindale v. Clarkson* (1880), 6 A. R. 1, is not in respect of a mere equitable estate, but is upon the effect of the wife's having her legal dower in a mortgage on property owned in fee simple by the husband. For the provisions of 42 Vict., as embodied in the R. S. O., may give her dower out of the equity of redemption, though her husband does not die seized of that estate.

But I am not able to take the same view on the other matter argued as my brother Robertson. The question is a dry legal one, whether the husband had seizin of the land of such an estate as to give the wife dower. There is no room for the application of equitable doctrines, or of the learning as to estoppel, and no ground in fact for finding that the deed and mortgage of 26th October—the former from Heinmann to Luckhardt, and the latter from Luckhardt to Heinmann—were delivered in escrow. The legal estate was, at the first, outstanding in Winger, and when the discharge of mortgage executed by him was registered on the 29th October, that operated as a reconveyance or conveyance of the legal estate to Heinmann. Prior to this, on 26th October, Heinmann had conveyed the equity of redemption to Luckhardt, and Luckhardt had contemporaneously mortgaged that estate to Heinmann, but the legal effect of that was to make Heinmann the person in whom the legal estate vested on the registration of the discharge.

The deed and mortgage in question, on the face of them, purport to be signed, sealed, and *delivered* on the day of date, and the evidence is that on that day the whole transaction was completed, and the deed and mortgage handed over unconditionally to be sent for registration, and nothing remained to be done to complete the transaction; no evidence at all of the deed and mortgage being held in suspense, and only to become operative upon and after the registration of the discharge.

As the matter was completed, no legal estate vested in the husband, and no dower arose in the wife. It might have been done differently so as to give rise to dower and legal estate, but we have to deal with the case as it is.

Judgment.
Boyd, C.

Judgment is affirmed. No costs of appeal.

FERGUSON, J. :—

Before the passing of the Act 42 Vict. ch. 22 (O.), a married woman was entitled to dower out of an equitable estate, only when the husband died seized of it. Since the passing of that Act, she is entitled to dower out of an equitable estate regardless of the husband's dying seized of it, when the equitable estate comes into existence by the husband, being owner of the land, executing a mortgage upon it, in which the wife joins to bar dower. The husband then has the equity of redemption, an equitable estate in the land of which, before the execution of such mortgage, he was the owner. This is the equitable estate out of which dower seems to be given by that statute. This view seems to be clearly in accord with the remarks of the late lamented Mr. Justice Patterson in the case *Martindale v. Clarkson* (1880), 6 A. R. 1, relied upon in support of the contention opposed to this view. This seems to be the "new right" referred to by that learned Judge. So far as I am able to see, the right to equitable dower in cases other than the one above described is unaffected by that statute, and stands as it stood before the Act was passed.

In the present case the husband was not at the time of the making of the mortgage, in which his wife joined to bar dower, the owner of the land. There was an outstanding mortgage upon it made by one who was or had been the owner. I think the case does not, in respect of this branch of it, fall within the provisions of the Act above referred to (42 Vict. ch. 22), and I fail to see that this claimant is entitled to the "new right" spoken of as above in the case *Martindale v. Clarkson*.

Judgment. As to the contention that the husband became entitled to the legal estate at the time of the discharge by Winger of the \$1,200 mortgage, this was the mortgage existing upon the land at the time the equity of redemption came into the hands of the husband when he gave back another mortgage for \$2,000, parcel of the purchase money. He afterwards mortgaged again to secure \$1,000, and under this last mortgage the lands were sold. As I understand, the claimant here executed each of these mortgages to bar dower. I am of the opinion that upon the registration of the discharge by Winger of his mortgage, the legal estate that Winger had went directly to the husband's then existing mortgagee, without passing, even momentarily, through the husband. I think this the effect of the operation of the statute in such a case, and I think the contention fails.

The husband is still living. It does not appear that he has had, during the coverture, the legal estate in these lands; on the contrary, it does appear that he has not had it. The husband cannot now die seized of the equitable estate in the land. This claimant does not appear to be entitled to any right of dower in the land, and consequently none in respect of the money into which the land has been converted.

The judgment should, I think, be affirmed. There should, I think, be no costs of the appeal.

ROBERTSON, J. (after stating the facts at length, as above):—

The application of the receiver was opposed by Amelia Luckhardt, the wife of Luckhardt, she claiming that, as dowress, she would be, in case of the death of her husband, entitled to the amount in Court, she having barred her inchoate right to dower, as security, only to the extent of the mortgage money in the said lands.

On the part of the receiver for the judgment creditor, it is contended that Amelia Luckhardt is not entitled, for the reason that at the time of the conveyance from Frank

Heinmann to her husband, Heinmann only had an equitable estate in the land, inasmuch as the statutory discharge of the Winger mortgage had no legal effect to make it valid and effectual in law as a release of the mortgage and a conveyance to the mortgagor of the original estate of Heinmann as mortgagor, under the 76th section of the Registry Act, 1893, 56 Vict. ch. 21. Judgment.
Robertson, J.

The question to be disposed of is one of fact, whether the deed by Heinmann and wife to Luckhardt, although executed before the registration of the discharge of the mortgage held by Winger, was not intended to convey the fee simple absolute to Luckhardt, freed from all incumbrances, and particularly the mortgage held by Winger, and whether there was in law and in fact a delivery of the deed until after the discharge was registered.

I have carefully considered the whole of the evidence, inclusive of the deeds, and the conclusion I have come to is so clear that I have not the slightest doubt that the intention of both vendor and purchaser was that the former was to convey freed and discharged from the Winger mortgage. The very terms of the bargain were that this mortgage was to be discharged in order that the purchaser could give back a first mortgage to secure \$2,000 of the purchase money. This was the intention of the parties and the agreement beyond question. There is no dispute as to that fact; and it was carried out in the way it was as a mere matter of convenience, the parties not residing in the town where the registry office is, and very likely because of the want of knowledge on the part of the parties as to the effect of the 76th section of the Registry Act; but that, in my judgment, should not, as between the purchaser and his wife, deprive her of her inchoate right to dower; and if he has no rights in that direction, his creditors, the present claimants, stand in no better position. The deed from Heinmann expressly covenants that he has the right to convey the said lands, notwithstanding any act of his; that the grantee shall have quiet possession free from all incumbrances, and that he has done no act to

Judgment. incumber the said lands; and his affidavit, *inter alia*, Robertson, J. states: "4th. The terms of the said agreement provided for the procurement by Luckhardt of a discharge of the said mortgage" (that is, the mortgage which he, himself, had given to Winger, not any mortgage of Luckhardt's), "so that he" (Luckhardt) "could give me" (Heinmann) "a first mortgage on the property as security for \$2,000, part of the purchase money." This was done by Luckhardt causing the purchaser of other property from him to give a mortgage for the amount due to Winger in satisfaction of the Heinmann mortgage; so that, in fact and in truth, he, Luckhardt, paid or satisfied the Heinmann mortgage to Winger, as part of his purchase money of the Heinmann property, in order to get a clear title from Heinmann, so that he could give him back a first mortgage on the property.

Taking all the facts and circumstances into consideration, I think it would be most inequitable between the parties before the Court on this application, to hold, merely because the deed bore date and was signed before the discharge was registered, that Luckhardt, contrary to the intention of himself and his vendor, did not become seized of more than an equitable estate, so as to deprive his wife of her inchoate right to dower. It is clear that the deed was to be of no effect until Heinmann had in himself the fee simple in order that he could convey it to Luckhardt. That being so, the registration of the discharge having been perfected at 10 o'clock a.m. of the 29th October, at that moment the title was complete in Heinmann; his deed to Luckhardt also immediately took effect, and Luckhardt became seized, and by reason thereof his wife became entitled as dowress inchoate, which right she assigned as security for the repayment of the mortgage money, \$2,000. Subsequently, the second mortgage was given to John R. Reising.

With great respect, therefore, for those who differ in opinion, I am forced to the conclusion that Mrs. Luckhardt is entitled to an inchoate right to dower, and, conse-

quently, to have set apart for her use, in case she survive ^{Judgment.} her husband, (he appears to be living apart from her at ^{Robertson, J} present), one-third of the above sum of \$1,601.35, which amounts to \$533.78; but, inasmuch as the second mortgage absorbed \$1,236.05 of the \$1,601.35, there is only \$375.05 to represent the actual dower. The consequence is that she can only have the amount now in Court so set apart, and that should remain there for future disposal, as circumstances may warrant. That is the view I take of the matter, and I think there is authority for so holding.

In *Trust & Loan Company v. Ruttan* (1877), 1 S. C. R. 564, the action was for breach of covenant for quiet enjoyment. The deed in which was the covenant was from the defendants to one Thompson, and was dated and signed 22nd June, 1855, and the mortgage from Thompson to the plaintiffs was given before the deed and was dated 10th April, 1855 both were registered on the 28th July, 1855, the deed first. It appeared that there were two mortgages from Thompson to the plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing the mortgage of 10th April, Thompson found that a deed from the defendants was necessary to give him the legal title, and he got the deed in question, which contained the covenant for breach of which the action was brought. The two mortgages were not discharged until 16th August. Held, on appeal, affirming the judgment of the Court of Queen's Bench (32 U. C. R. 222) and reversing the judgment of the Court of Appeal (1 A. R. 26), that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of Thompson's title and the discharge of the mortgages for which it was given, and that the plaintiffs, therefore, could recover.

Now in the case under consideration, the deed from Heinmann to Luckhardt was not delivered to Luckhardt, but to Henderson, a stranger, who was to hold it until the discharge from Winger was recorded; so that he, Heinmann, would thereby have a clear title in fee; and then Luckhardt's mortgage was to be handed to him, Heinmann,

Judgment. with the deed he himself had made, to hold until the Robertson, J. Luckhardt mortgage was paid off; but, even if the delivery to Henderson had not taken place as it did, I do not think it would have made any difference, the real intention of the vendor and purchaser being that the one should convey, and the other take, the legal title in the land freed from the incumbrance of the Winger mortgage.

In *Watkins v. Nash* (1875), L. R. 20 Eq. 262, Sir Charles Hall lays down the principles which govern in this case; he says (p. 266): "It is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books—Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A.B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument."

It appears to me that the circumstances related in another part of Sir Charles Hall's judgment are most applicable; and changing the names of the parties here for those mentioned there, it would read thus: "As regards the instrument in question (*i.e.*, the deed from Heinmann to Luckhardt), it might very well, under the circumstances, be meant and taken to be a delivery by Heinmann to Henderson, to be held by him for the purpose of being delivered over to the grantee when the transaction (so far as the registration of the discharge is concerned) was com-

plete. I see no difficulty whatever in that view being Judgment.
adopted."

Robertson, J

There is also the case of *Millership v. Brookes* (1860), 5 H. & N. 797, referred to by Sir Charles Hall as to the principle upon which that case proceeded; he says it was this: "That the delivery was not to the grantee, or the person who was to have the benefit of the deed, but was to some one as the person who was to hold or to be considered as holding the deed in an incomplete state for the benefit of all parties.

* * But I might go further, and say, if it were necessary to determine the question, that the document might be an escrow, even though there was no particular person selected who under the circumstances could be considered as being the person into whose hands it was delivered, it being clear that there was no delivery at all to the grantee; that the delivery was not intended to be a delivery to the grantee at all, and that it was intended to be an instrument incomplete as a transfer of the legal estate until the conditions prescribed had been performed."

Mr. Justice Strong in his judgment in *Trust & Loan v. Ruttan*, at p. 583, says: "Although it was formerly essential to make a sealed instrument operate as a mere escrow that express words should be used, such is not now the state of the law, and what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended:" and he refers to a great number of cases in support of that view; and then he proceeds: "They establish no other rule of law than that I have just mentioned, but they shew the application of the rule to a variety of cases."

Then, again, we have the fact that the deed from Heinmann to Luckhardt contains a covenant on the part of the grantor that he has a good title, and the grant is in fee, and not only that, but the mortgage back from Luckhardt to Heinmann comprises the usual absolute mortgagor's covenants for title, so that, according to the law as established in Upper Canada now for upwards of sixty years,

Judgment. it has been held that covenants for title, especially the usual covenant that the granting party is seized in fee at the date of the deed, are as effectual in working an estoppel as a recital to the same effect would have been; and the cases of *Doe Hennesy v. Myers* (1832), 2 O. S. 424, and *Doe Irvine v. Webster* (1842), 2 U. C. R. 224, are referred to. Here we must look at the case as between the husband and wife; in other words, as if the husband, who is now living apart from his wife, was claiming, instead of one of his creditors; that being so, the doctrine of estoppel applies; he cannot set up, for the purpose of depriving his wife of her inchoate right to dower, that he had not the legal estate at the time he made the mortgage in which he covenanted he had the legal estate, and in which she joined him as a surety to the extent of her rights as dowress.

I am, therefore, of opinion that the appeal should be allowed, and that the applicant should pay the costs not only of the appeal but of the Court below.

E. B. B.

HOEFNER V. THE CANADIAN ORDER OF CHOSEN FRIENDS.

Benevolent Societies—Subordinate Councils—Power to Waive Initiation—Relief Fund—R. S. O. 1877, ch. 167.

A subordinate council of a friendly society, incorporated under R. S. O. 1877 ch. 167, has no authority to waive the requirements for initiation of members prescribed by the rules, where such initiation is a condition precedent to a claim on the relief fund of the society.

THIS was an action on a relief fund certificate of the Statement.
defendants brought under the circumstances fully set out in
the judgment, where the cases cited are also mentioned.

The action was tried at the non-jury sittings at Hamilton, before ROBERTSON, J., on November 29th, 1897.

Teetzel, Q.C., and *McClemont*, for the plaintiff.

Aylesworth, Q.C., and *Lee*, for the defendants.

January 10th, 1898. ROBERTSON, J.:—

This action is brought by the plaintiff who is the mother of the late William Alfred Hoefner, who departed this life on or about January 14th, 1897; and the plaintiff claims that deceased was duly and regularly elected, initiated and admitted to beneficiary membership in Blackheath Council, No. 354, a subordinate council of defendants' Order, and his proper initiation fees and assessments duly paid, etc.; and to have a relief fund certificate for \$1,000, payable to the plaintiff, issued by the defendants, which they have neglected and refused to issue; and the plaintiff claims that defendants may be ordered to issue such certificate and to pay the plaintiff the amount thereof, she being the party designated to whom all benefits are payable by defendants in case of his death.

The defendants are a corporation duly incorporated under the provisions of R. S. O. 1877, ch. 167, and are duly registered as a friendly society under the provisions of ch. 36 of 60 Vict. (O.). The defendants deny

Judgment. all the allegations contained in the plaintiff's statement of claim, except the allegations that they have refused to pay the amount claimed; and among other defences specifically set forth they say that said W. A. Hoefner never became a member, beneficiary or otherwise, of their Order, or any subordinate council thereof; nor did they ever enter into any contract with him of any kind whatever; that they have never recognized, but, on the contrary, have always refused to recognize the alleged membership in defendants' society or any subordinate council thereof and have never issued any certificate of membership of any nature whatsoever to the said Wm. A. Hoefner, etc. Issue is joined on this.

The facts are as follows:—A short time previous to November 14th, 1896, William A. Hoefner, the deceased, petitioned the Blackheath Council to admit him as a member of the Order. On the said November 14th, he was examined by the medical examiner of the council and was passed as being in every way physically and bodily fit to become a member of the Order. On December 23rd, being Wednesday, before Friday the regular day of meeting, the deceased was balloted for and elected. This meeting was not called specially for that or any other particular purpose, but merely because the regular meeting fell on Christmas night, nor was any committee appointed when the application was received by the council, to investigate the character and fitness of the applicant as required by section 221, article 6, of the constitution of the subordinate council. Matters stood in this way until January 4th, 1897, when the applicant had a severe attack of erysipelas in the face, and was confined to his bed. He grew worse from day to day and subsequently had, also, an attack of pneumonia, which caused his death on January 14th. While he was thus suffering (being out of his mind at times), on the 8th day of January, the chief councillor of the council, one Saunders, with whom deceased was then living and in whose house he was confined to bed, says it was suggested to him that it was a

pity that Hoefner had not been initiated, and after talking the matter over with the doctor and this plaintiff, who was present in attendance on her son, Saunders went to and consulted with the prelate of the council, a clergyman living in the village, and it was concluded by them that he, Saunders, should administer to Hoefner the obligation which is a necessary part of the initiation proceedings. This was done, no one being present except Saunders and the prelate, except the wife of Saunders who is a member but who was in and out of the room from time to time during that ceremony. The unfortunate applicant was then very low. Neither Saunders nor his wife could say whether he knew or understood what was going on or not. The wife was of opinion that he did not; but notwithstanding this the work was proceeded with as follows: The first thing done was to have the formal application of the applicant signed by him, which was done in this way: Saunders took a pen and wrote the name of Hoefner to it, the latter not being able from weakness to hold the pen in his own hand—merely touched the top of it, as directed—(in health he wrote a fairly good hand); this being accomplished, Saunders still standing by the bedside, with the ritual in his hand (the ritual being a book of forms and directions authorized by the constitution of the Order, of the proceedings required to be observed at all initiations and other ceremonies when the council is duly constituted, for business purposes), and the prelate, being also present, the latter took Hoefner by one hand, and said to Saunders, "Now go on;" whereupon Saunders read over the obligation to Hoefner, which commences with, "I (repeating his name), do most solemnly and sincerely promise and affirm that," etc., (setting forth four distinct and important promises which he would observe and keep), and winding up as follows: "With a complete understanding of this my obligation, I pledge my honour." Hoefner was unable to repeat the obligation, even by sentences as required, but after it was read over in the way indicated, he was asked by Saunders, "Will you keep this obligation?" to which Hoefner replied, "You bet I will."

Judgment.
Robertson, J.

Judgment. Now this was all that was done at this time, which was Robertson, J., about one o'clock p.m. Afterwards, at nine o'clock p.m., the Court opened in the regular council room, Chief Councillor Saunders in the chair, and the minutes of the meeting recorded are in these words: "The only business transacted was the initiation of William A. Hoefner, and Thomas Anderson. There being no further business, Court closed in the usual manner." Now, this on the evidence of Saunders and the recorder was not a true entry. Hoefner was not present, nor could he be; he was then in bed in a very low state—not expected to live, and did only live six days thereafter; so that, in fact, the ceremony of initiation, as required, was never completed; nor, in fact, was it ever begun; nor was the obligation administered in the solemn form required in a duly constituted Court of the council after certain other forms and proceedings had been strictly complied with; I am, therefore, obliged to find as a fact that Hoefner never became a member of the order.

The plaintiff, however, contends that the deceased was not in any respect responsible for the irregularity in the initiation proceedings, and further that the defendants cannot avail themselves of that, inasmuch as they are bound by what the subordinate council did, and it being recorded in the regular minutes of the proceedings that the deceased had been initiated, the defendants are bound by that and plaintiff refers to sections 1, 2, 3, 4 and 5 of article 1 of the constitution in these words:

NAME AND POWERS.

Section 1.—This body shall be known as the Grand Council of the Canadian Order of Chosen Friends, with power to make its own constitution, laws and rules of discipline, and constitution and general laws for the government of the whole order.

Section 2.—Its decisions on all matters pertaining to the order, and on all appeals properly presented, shall be final.

Section 3.—It shall have exclusive power to grant charters to subordinate councils. It shall have power, by a

vote of three-fourths of the representatives present at a Judgment. stated meeting, to deprive any subordinate council of its Robertson, J. charter, and annul its authority.

Section 4.—It shall have original, co-ordinate and concurrent jurisdiction in all matters with subordinate councils, whenever it may deem it for the best interests of the Order to exercise the same (excepting the acceptance of new members), notwithstanding any delegation of power to such subordinate councils.

I do not think the expression in section 4 “excepting the acceptance of new members” supports the contention of Mr. Teetzel; it only goes so far as to say the grand council does not interfere with the acceptance of any person who may be qualified to join the Order, but it does not extend to the manner of his becoming a member—in that respect the laws must govern.

Section 5.—It shall have power to deprive any subordinate council of its charter and annul its authority for :

First.—Knowingly accepting improper persons as members.

Second.—Knowingly recommending improper claims upon the relief fund for payment.

Third.—Wilful and persistent violation of any of the laws of the Order.

Fourth.—Insubordination or acts tending to the injury of the Order.

Fifth.—For neglecting or refusing to conform to the constitution or laws of the grand council or the general laws or regulations of this Order.

Sixth.—For wilfully refusing to make its returns, or for non-payment of the assessment to the relief fund and of the dues to the grand council.

Seventh.—When its membership diminishes to less than five in number.

Section 6.—It shall have the power to strike the name of any member summarily from the roll of beneficiary membership and cancel his or her relief fund certificate for the following offence, viz: Any misrepresentation or con-

Judgment. sealment material to the contract of benefit insurance in
Robertson, J. the petition for membership or in the medical examination as to any fact regarding which the member is questioned, or any false answer material to the contract of benefit insurance made to any such question or to the medical examiner or the investigation committee, etc.

It is contended further that all that defendants can do is to deprive the subordinate council of its charter and annul its authority, and that it is estopped from objecting to what was done on this occasion.

I am not able to agree to this. No authority or decision of our own Courts has been cited to me in support of this contention, but I find numerous cases in the American reports which hold the contrary to be the law, and, taking into account the fact that institutions of the kind in question are more of an American outgrowth than of English or Canadian, I do not think I should disregard them, the reasoning of the learned Judges in regard to the point being, in my judgment, satisfactory and in accord with my own view.

In several of those cases I find that the acts of a ministerial officer of a subordinate lodge, council or body and the officers of a mutual insurance company, which this organization is, in so far as their relief fund is concerned, cannot waive the requirements of its laws; as to which I refer to the cases to be found in the following American reports: *Miller v. The Hillsborough Mutual Fire Assurance Association* (1887), 42 N. J. Eq. 459; *Swett v. Citizens' Mutual Relief Society* (1886), 78 Maine 541; *McCoy v. Roman Catholic Mutual Insurance Co.* (1890), 152 Mass. 272; *Eaton v. Supreme Lodge Knights of Honour* (1885), 29 N. E. Rep., 1123, 22 Cent. L. J. 560; *Grand Lodge Ancient Order United Workmen v. Jesse* (1892), 50 Ill. App. 101; *Lyon v. Supreme Assembly of the Royal Society of Good Fellows* (1891), 153 Mass. 83.

In several cases I find it laid down as above stated, and the reason is given "for if they could, then it would logically result that such officer or officers has or have the

power to suspend or abrogate the constitution and by-laws of the association at his or their mere will and pleasure, which in the very nature of things, cannot be allowed. Clearly he or they are invested with no such extraordinary power;" as to which see *Harvey v. Grand Lodge Ancient Order of United Workmen* (1892), 50 Mo. App. 472 at p. 478; *State of Missouri ex rel. Young v. Temperance Benevolent Association* (1890), 42 M. A. 485; and other cases referred to in Bacon on Benefit Societies, 2nd ed., vol. 2, sec. 434a.

In the case of *Supreme Lodge Knights of Honour v. Keener* (Texas Civil Appeals), (1894), 25 S. W. Rep. 1085 at p. 1086, the Court said: "If this be permitted, then a subordinate lodge by its unauthorized act, or by its culpable omission of duty may override and render nugatory the express provisions of the supreme law of the order."

In Bacon on Benefit Societies, 2nd ed., vol. 1, sec. 63 (a), it is laid down: "If the charter or articles of association, prescribe the manner of electing and admitting new members these requirements must be observed, or the election is invalid."

In *Matkin v. Supreme Lodge Knights of Honour* (1891), 82 Tex. 301, as cited in Bacon on Benefit Societies, *ibid*, it was held that "where a ceremony of initiation is required by the laws of a society, a person, though duly elected, is not entitled to benefits unless regularly initiated, and it is immaterial that the ceremony is secret," etc.

Now, the objects of this Order of Chosen Friends, as stated in their constitution, are not merely to establish a fund for the purpose of insurance of members who have complied with all its lawful requirements, as declared by the constitution, but for something more, as is seen by article 2 of the constitution and laws, put in as evidence, which is as follows:

First.—To unite in bonds of fraternity, aid and protection, all acceptable white persons of good character, steady habits, sound bodily health, reputable calling, and who believe in a Supreme Intelligent Being, the Creator and Preserver of the universe.

Judgment. Second.—To improve the condition of its membership, **Robertson, J.** morally, socially, and materially, by timely counsel in the seven cardinal virtues, and instructive lessons in the seven liberal arts and sciences, and by assistance to obtain employment when in need.

Third.—To establish a relief fund from which the (beneficiaries of) members of this organization who have complied with all its rules and regulations shall receive the sums designated in his or her relief fund certificate, which shall be paid as hereafter provided.

As to which I adopt the language of the Court in *Matkin v. Supreme Lodge Knights of Honour* (1891), 82 Texas R. 301, at pp. 304-5, as being most appropriate: "With these and other beneficial objects in view, it is not difficult to see why there should be a regular initiation into the Order, and why members only can participate in its benefits. The ceremony * * is doubtless intended to bind the members to a performance of their duties in respect to the objects to be accomplished. We could not say that it is a useless and unreasonable requirement. The affiliation is close and confidential for good purposes, so far as can be seen from the testimony. * * The entire system, its existence and objects are based upon initiation. We think there can be no membership without it, and no benefit, pecuniary or otherwise without it."

The application signed by Hoefner in this case, *inter alia*, contains the following: "I further agree that the acceptance of the fees and application by any member shall not entitle me, my family or dependents or any person whatsoever to participate in the relief fund, until this application has been approved by the Grand Medical Examiner, and entered on the books of the Grand Recorder; nor shall I or any person or persons whatsoever have any claim whatever upon the Order until I am duly and regularly initiated and my advance assessment paid."

So that according to the proposal of the deceased to become a member and thus to enable or qualify him to participate in the relief fund, he agreed that until he is

duly and regularly initiated he cannot do so. But besides ^{Judgment.} this, section 72 of the constitution declares, *inter alia*: ^{Robertson, J.} "No person shall become a beneficiary member of this order until * * he or she has been duly and regularly initiated."

There are other reasons why this plaintiff cannot recover, and these are set forth in the statement of defence, but there is a direct issue as to the deceased never having become a member, which I am obliged to find in favour of the defendants, and that is sufficient for the purposes of this case.

I therefore am obliged to dismiss the action, but as the subordinate council of the defendants' organization are chiefly to blame for the extraordinary proceedings which were enacted with the view of foisting the deceased upon their organization and which has led to this litigation, I dismiss the action without costs.

A. H. F. L.

[DIVISIONAL COURT.]

PATTERSON V. THE CENTRAL CANADA LOAN AND SAVINGS COMPANY.

Waste—Permissive Waste—Growth of Weeds—Tenant for Life—R. S. O. ch. 202.

An action for permissive waste will not lie against a tenant for life.

In re Cartwright (1889), 41 Ch. D. 532, followed.

The spread of noxious weeds from natural causes or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, and the failure to stop the growth thereof is no evidence of waste, but only of ill-husbandry; and the fact that there is a statute, R. S. O. ch. 202, for the prevention of the spread of noxious weeds does not make any difference.

Statement.

THIS was an action brought to recover damages to the reversionary interest of the plaintiffs alleged to have been caused by certain acts of voluntary and permissive waste of the defendants or their tenants. The plaintiffs were two of the nine children of Alexander and Mary Patterson, and the defendants were mortgagees of Alexander and Mary Patterson, and as such entitled to their life estate in the lands in question, the reversion in fee being vested in their children, under the will construed in the case of *Patterson v. The Peterborough Real Estate Co.* (1888), 15 A. R. 751.

The other facts in the case are stated in the judgments.

The action was tried at the Peterborough Autumn Assizes on October 4th and 5th, 1897, before STREET, J., who, on October 27th, 1897, gave judgment, holding that the defendants were liable only for voluntary and not for permissive waste, on the authority of *In re Cartwright* (1889), 41 Ch. D. 532*; and fixed the total damages at \$72, whereof the plaintiffs were entitled to two-ninths, namely, \$16 between them; and he awarded no costs to the plaintiffs, and to the defendants two-thirds of their whole costs of defence.

* 17 C. L. T. 380.

The plaintiffs appealed to the Divisional Court, and the motion was argued on January 27th, 1898, before BOYD, C., and ROBERTSON, J. Statement.

N. F. Davidson, for the plaintiffs, argued that the statutes of Marlbridge and Gloucester placed the liability of tenants for life for waste on the same footing as that of tenants for years, and that the cases in which the latter had been held liable for permissive waste, applied a *fortiori* to the former: 2 Leith's Blackstone, 2nd ed., p. 309; Gibbon's Law of Dilapidations, at pp. 92-4, 97; *Parteriche v. Poulet* (1742), 2 Atk. 383; Roscoe's Nisi Prius Evidence, 16th ed., vol. 1, at p. 336; Addison on Torts, 6th ed., p. 413; Woodfall on Landlord and Tenant, 15th ed., at pp. 645-8; *Yellowly v. Gower* (1855), 11 Exch. 274, 294; *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Davies v. Davies* (1888), 38 Ch. D. 499; *Harnett v. Maitland* (1847), 16 M. & W. 257; Am. and Eng. Ency. of Law, vol. 28, p. 889; that the defendants were liable at any rate for disappearance of the fences from the farm, and that not to repair fences is waste: Woodfall, *ib.*, pp. 643, 652; and that the plaintiffs were entitled to vindictive damages: *Witham v. Kershaw* (1885), 16 Q. B. D. 613; and to an injunction: *Pratt v. Brett* (1817), 2 Mad. 62; Kerr on Injunctions, 3rd ed., p. 529; *Coffin v. Coffin* (1821), 6 Mad. 17; High on Injunctions, 3rd ed., vol. 1, sec. 434; Gibbons on Dilapidations, p. 234; *Doherty v. Allman* (1878), 3 App. Cas. 709, 724; Con. Rule 1130; and to costs: *Cooper v. Whittingham* (1880), 15 Ch. D. 501; *Upmann v. Forester* (1883), 24 Ch. D. 231; *American Tobacco Co. v. Guest*, [1892] 1 Ch. 630; *Sparrow v. Hill* (1881), 8 Q. B. D. 479.

D. W. Dumble, for the defendants, relied on *In re Cartwright* (1889), 41 Ch. D. 532, referred to in Pollock on Torts, 5th ed., pp. 327-8; and argued that if a tenant for life were liable for permissive waste there would have been innumerable cases since the statute of Marlbridge; that all the cases cited from Woodfall, were cases of landlord and tenant. He also referred to *Dent v. Dent* (1862), 30 Beav. 363; and contended that as a life tenant has only an uncer-

Argument. tain interest, the obligation to re-build houses and make lasting repairs might be a very hard one.

Davidson, in reply, stated that though the author of *Pollock on Torts* had altered the text on account of *In re Cartwright*, the text writers cited by him had not done so.

February 2nd, 1898. The judgment of the Court was delivered by

BOYD, C.:—

It appears unnecessary to delve into the ancient law with a view of impeaching the decision of Mr. Justice Kay in *In re Cartwright* (1889), 41 Ch. D. 532. That case is apparently supported by the authority of a Divisional Court consisting of Lopes and Stephen, JJ., not there cited, although decided in 1881. It is *Barnes v. Dowling* (1881), 44 L. T. N. S. 809, where it is laid down that the weight of authority in equity is clearly opposed to an action for permissive waste against a tenant for life, and assuming that there was doubt or conflict as to the legal liability, and that there was variance between the rules of equity and those of common law with reference to permissive waste, they were bound to give effect to the former, and therefore held that an action for permissive waste will not lie against a tenant for life. We have the same provision in the Judicature Act as to the prevalence of the rules of equity in case of conflict as is alluded to in *Barnes v. Dowling*, and that is authority which concludes us in this appeal so far as the relief sought is in respect of permissive waste. *In re Cartwright*, is also affirmed in *In re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28, 32.

It may be noted that the subject of waste was a familiar one to Mr. Justice Kay, and the whole subject was dealt with by him in *Re Williames, Andrew v. Williames* (1884), 52 L. T. N. S. 40, which was affirmed in appeal (1885), 54 *ib.* 105. The opinions of the text writers cannot be weighed against their judgments, and as a matter of fact

they neutralize each other by a process of set-off. For against Roscoe, Addison, and Woodfall (or the modern editor thereof), can be set Pollock, Bewes, and White & Tudor, who support *In re Cartwright*.

Judgment
Boyd, C.

The finding of the trial Judge as to active or commissive waste is limited to two heads, first, in regard to the stone taken away from the base of the fence, and second, in regard to trees cut. As to these, I think he has perhaps allowed too little for the stone placed as it was in the fence, but he could well have disallowed anything for the trees. I should on the evidence say that there was no waste in cutting or disposing of these—some were blown down—others interfered with the utilization of arable land, and they were not in all more than enough for firewood. Still there is no cross-appeal and these findings in money value may, therefore, be allowed to stand.

A strong argument was made about the deterioration of the farm on account of the spread of mustard seed and quack grass. Had these been sowed by the tenant it would have been an act of actionable waste: *Pratt v. Brett* (1817), 2 Madd. 62. But the spread of these weeds from natural causes, or by the action of cattle depasturing or eating hay or straw that came from the fields where the mustard was, and the failure to overcome the growth and spread of these and thistles by a process of summer fallowing, or by a process of hand-picking, is no evidence of waste, but only of ill-husbandry: 2 Rolle Abr. 814, 22 Viner's Abr., p. 437, Tit. Waste D. 2. The same result would have followed had the land been left uncultivated, for it is in evidence that the farm was injured by the presence of these noxious weeds in many places before the defendants took possession. And to leave the land uncultivated is not waste either wilful or permissive: Parke, B., in *Hutton v. Warren* (1836), 1 M. & W. 466, 476.

That there is an Ontario statute for the prevention of the spread of noxious weeds, R. S. O. ch. 202, does not change the character of the inaction attributed to the defendant. He is not thereby made liable *qua* tenant for

Judgment. life to the remainderman, though there may be a direct
Boyd, C. remedy against the occupant or owner of the farm under provisions of the statute: *Osborne v. Corporation of the City of Kingston* (1893), 23 O. R. 382.

I agree with what the learned Judge says about the fences. They were old ones to begin with; many of the rails were useless with age, and the fences had to be reconstructed in a more economical manner (I mean in the way of saving material, for the Russel fence is better than the old fences), and new rails were brought in to assist in the change which had to be made. It is said for the defence that allowing for necessary decay of material the fencing in the whole is as extensive now as in 1889. And a tenant for life is not called on to bring in new rails for fences if there is no suitable material on the place, which was the case here: see *Whitfield v. Weedon* (1772), 2 Chit. 685.

The buildings were very old, and have suffered from decay and exposure; but the tenant is not legally bound to repair, in the absence of a direction to that effect in the instrument creating the present and the reversionary estates. If premises are suffered to become dilapidated by omission to repair, and so run down through mere neglect, that is no more than permissive waste for which an action does not lie: *Gibson v. Wells* (1805), 1 B. & P. N. R. 290. Though it may be the duty of the tenant for life, and in his own interest to keep up the buildings in habitable shape, he cannot charge the expense on the inheritance, nor can he be punishable for waste if he abstains: *In re Leigh's Estate*, L. R. 6 Ch. 887, 892; *In re Freman, Dimond v. Newburn* (1898), 1 Ch. 28.

Now, the action is clearly separable as between the two kinds of waste permissive and commissive, and both are claimed here. As a matter of pleading a claim of voluntary waste will not support proof of permissive waste: *Martin v. Gilham* (1837), 7 A. & E. 540, and therefore the Judge at the trial might well discriminate as he did in the apportionment of costs. The amount recovered was but \$16, for which the action might have been brought in the

Division Court. It was not a case for injunction for many reasons; the acts of spoliation as proved were of minor importance—none of recent date—no likelihood of their repetition, and any intention to commit torts repudiated by the defence. In such a conjunction of circumstances the Court will refuse to enjoin, and will treat the case as one merely for damages, the small amount of which will be regarded in deciding as to costs: *Barry v. Barry* (1820), 1 J. & W. 651; *Lambert v. Lambert* (1840), 2 Ir. Eq. R. 210; *Whittingham v. Wooler* (1817), 2 Swanst. 428.

Judgment.
Boyd, C.

The discretionary method of disposing of the costs is not the subject of an appeal in this case, and altogether I think the judgment should be affirmed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

FOLEY ET AL. V. TOWNSHIP OF EAST FLAMBOROUGH.

Municipal Corporations—Highway—Repair—Accident—Runaway Horses—Control.

The word "repair," as used in the Municipal Act with reference to a highway, is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

And where the driver of a vehicle lost control of his horses, which ran away and caused the injury for which the action was brought by their running the vehicle against a stump in the highway, it was held, that the plaintiffs could not recover against the municipality, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel.

THIS was an action brought by the widow and child of a man named Foley, who was killed by being thrown from a waggon on the Centre road in the township of East Flamborough, against the township corporation, for damages for his death. The plaintiffs charged that the death was caused

Statement.

Statement. by the road being out of repair, by reason of an obstruction in the shape of a stump, against which the wheel of the waggon struck, and caused the vehicle to be overturned. The waggon and the horses attached thereto belonged to one Sullivan, who was a friend of Foley, and who was driving him home from the market town. The evidence shewed that the horses were spirited animals, and were running away and beyond Sullivan's control at the time the waggon was upset. There was evidence that both men had been drinking.

The action was tried at Hamilton before BOYD, C., who dismissed it on the ground that Sullivan was drunk at the time Foley got into the waggon with him, and Foley, if sober, must have known it and taken the risk, and had himself to blame for the accident.

The plaintiffs appealed, and their appeal was heard by a Divisional Court composed of ARMOUR, C. J., and STREET, J., on the 18th January, 1898.

Lynch-Staunton, for the plaintiffs, referred to *Flood v. Village of London West* (1896), 23 A. R. 530; *The Bernina* (1886), 12 P. D. 58; 13 App. Cas. 1; *Radley v. London and North-Western R. W. Co.* (1876), 1 App. Cas. 754; *Ridley v. Lamb* (1853), 10 U. C. R. 354; *Davenport v. Ruckman* (1868), 37 N. Y. 568; *Sherwood v. City of Hamilton* (1875), 37 U. C. R. 410; *Copeland v. Village of Blenheim* (1885), 9 O. R. 19.

W. T. Evans, for the defendants, cited *Waite v. North Eastern R. W. Co.* (1859), E. B. & E. 728; *Butterfield v. Forrester* (1809), 11 East 60.

January 28, 1898. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The learned Chancellor, who tried this case, did not find specifically whether the road upon which the deceased was injured was or was not in a reasonable state of repair;

and for the proper disposition of this case it is necessary that we should do so. Judgment.
Armour, C.J.

And we think that, upon the evidence, we must find it to have been, at the time of the accident, which caused the death of the deceased, in a reasonable state of repair, having regard to the requirement of the public using the road in the ordinary way.

The word "repair," as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether in a city, town, village, or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using the road.*

All these matters are to be taken into consideration, and from them is to be deduced the quality of the repair necessary to comply with the terms of the Act.

And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. I do not think that the road in order to fulfil the requirement of the law must be kept in such a state of repair as to guard against injury caused by runaway horses; and by runaway horses I mean horses whose riders or drivers have entirely lost control of them, and whether such control has been lost in spite of ordinary care or by reason of the want of it.

* The Centre road is the main travelled highway from Hamilton to Galt, running north and south, through the centre of the township. The township has been settled since about 1812, and the road has been opened for travel for forty or fifty years. The road is kept in repair out of township funds. There are several villages upon it.—REP.

Spurment. But for the decision of this Court in *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410, I should have held that in this case the running away of the horses and their ceasing to be at all under the control of their driver was the proximate cause of the injury, and that therefore the defendant could not be held liable, even had I come to the conclusion that the road was not in a reasonable state of repair at the place where the injury occurred.

In this case I assume that the driver, in spite of ordinary care on his part, lost control of his horses, and that they running away, the injury was caused by their running the vehicle in which the deceased was against the stump in the highway ; and because I find that, notwithstanding the existence of this stump upon the highway, it was in a reasonable state of repair for ordinary travel, I think the plaintiffs cannot recover.

The motion must therefore be dismissed with costs.

E. B. B.

THE GRAND TRUNK RAILWAY COMPANY V. HAMILTON
RADIAL ELECTRIC RAILWAY COMPANY.*

Railways—Railway Crossings—Jurisdiction of Railway Committee—Constitutional Law—Intra Vires—Dominion Parliament—51 Vict. ch. 29 (D.), secs. 4, 306, 307—56 Vict. ch. 27 (D.).

Sections 4, 306, and 307, of the Railway Act, 51 Vict. ch. 29 (D.), enacting that the plaintiffs and other railways, and any railways whatever crossing them, are works for the general advantage of Canada, and are to be subject thereafter to the legislative authority of Parliament, and 56 Vict. ch. 27 (D.), sec. 1, enacting that no railway shall be crossed by any electric railway whatever unless with the approval of the Railway Committee are *intra vires*, and therefore the Committee could empower the defendants' railway, contrary to the provisions of its Provincial Act of incorporation, to cross the plaintiffs' railway at grade, against the will of the latter.

THIS was a motion by the plaintiff the Grand Trunk Railway Company for an injunction restraining the defendants the Hamilton Radial Electric Railway Company from trespassing or entering upon, or taking possession of, or in any way interfering with certain lands of the plaintiffs in the township of Nelson, and from grading their line of railway, or laying the rails thereof upon the said lands, or upon or over the plaintiffs' railway at any point on or near the same; and from taking any further proceedings to expropriate any part of the said lands. Statement.

In the material used on the motion it was stated that the defendants who were incorporated by 57 Vict. ch. 88 (O.), were constructing a line of electric railway from Hamilton to the village of Burlington, and proposed to cross the plaintiffs' railway at grade at a point on the lands in question. The plaintiffs refused to sell any part of the lands to the defendants to enable this to be done, or to consent to the defendants crossing their line except by an under-pass or an overhead bridge. By section 19 of the defendants' charter it is provided that "except in cities, towns and

*The report of this case was withheld pending appeal, which, however, has now been abandoned, the matter having been settled between the parties.—REP.

Statement. incorporated villages, the railway of any company (operated by steam) shall not be crossed or intersected by the railways of the company hereby incorporated at grade."

The defendants then applied to the Railway Committee of the Privy Council for an order allowing them to cross the tracks of the Grand Trunk Railway Company, which was opposed by the plaintiffs, but on March 3rd, 1897, the Committee made an order approving of the place and mode of crossing the plaintiffs' railway as indicated by the defendants in their application, and prescribed certain conditions to be fulfilled in so doing, holding that under the provisions of the Railway Act, 51 Vict. c. 29 (D.), the defendants' company in respect of the crossing were within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of the Railway Act, and the defendants, thereupon, proceeded with the work of the crossing, and with an application to a County Judge for his warrant to the sheriff to put them in possession of that portion of the plaintiffs' lands necessary for their purpose. To restrain these proceedings the plaintiffs made this motion, pointing out special difficulties and dangers attaching to the one railway crossing the other at grade at the point in question.

The motion was argued on May 4th, 1897, before STREET, J.

Osler, Q.C., and *W. M. Douglas*, for the plaintiffs, contended that the Ontario charter obtained by the defendants having expressly prohibited a crossing at grade such as they desired in this case, the Railway Committee had no power to grant them a right denied by their charter, nor had the Dominion Parliament the power to authorize it so to do.

Shepley, Q.C., and *Osborne*, for the defendants, relied on the provisions of the Dominion Railway Act, which they contended were *intra vires* and gave the Railway Committee general jurisdiction in the matter of railway crossings.

The following statutes and authorities were referred to: **Argument.** The Railway Act, 51 Vict. ch. 29 (D.), secs. 2a, 3, 4, 8-12, 17, 18-21, 173-75, 177, 306-7; the defendants' Act of Incorporation, 57 Vict. ch. 88, secs. 14, 19, 55 (O.); The Railway Act of Ontario, R. S. O. ch. 170, secs. 2, sub-secs. 3, 9, sub-secs. 15-17, 19, 20, sub-secs. 23-24, 55-56 Vict. ch. 27, sec. 5 (D.); 56 Vict. ch. 27 (D.); *The Corporation of Parkdale v. West* (1887), 12 App. Cas. 602; *Hendrie v. The Toronto, Hamilton, and Buffalo R. W. Co.* (1895), 26 O. R. 667, 27 O. R. 46; *Attorney-General v. Niagara Falls Tramway Co.* (1890), 19 O. R. 624 (1891), 18 A. R. 453; *Ware v. Regent's Canal Co.* (1858), 3 D. & J. 212; Brice on Ultra Vires, 3rd ed., pp. 748, 752, 470-2; *Brooke v. Toronto Belt Line Co.* (1891), 21 O. R. 401; *The Kingston and Pembroke R. W. Co. v. Murphy* (1889), 17 S. C. R. 582; *In re Bell Telephone Co. and The Minister of Agriculture* (1884), 7 O. R. 605, 612; *Re The Dominion Provident Benevolent and Endowment Association* (1894), 25 O. R. 619; *Attorney-General v. Great Eastern R. W. Co.* (1879), 11 Ch. D. 449, 483, 502; *Re St. Catharines and Niagara Central R. W. Co. and Barbeau* (1888), 15 O. R. 583; B. N. A. Act, sec. 92, sub-sec. 10.

May 5th, 1897. STREET, J.:—

I am of opinion that the question raised here must be treated as absolutely determined by the order of the Railway Committee of the Privy Council subject to the right of appeal to the Governor in Council.

The defendants are incorporated by 57 Vict. ch. 88 (O.), to construct a line of railway crossing the plaintiffs' line of railway at Burlington, but are forbidden by section 19 to cross or intersect the line of any railway operated by steam, at grade. Proposing, however, as they do, to cross the plaintiffs' line, they are brought within the legislative authority of the Parliament of Canada by secs. 306 and 307 of the Dominion Railway Act of 1888, 51 Vict. ch. 29, and by section 4 of the same Act the provisions with regard to crossings are made specially applicable to them.

Judgment.
Street, J.

By sec. 11, sub-sec. (d), the Railway Committee have power to enquire into, hear and determine any application, complaint or dispute respecting the crossing of the tracks of one company by the tracks of another company.

By section 173 of the Act as amended by 56 Vict. ch. 27, sec. 1, the above powers are made specially applicable to the case of an electric railway seeking to cross an ordinary railway.

A dispute arose between the plaintiffs and the defendants as to the manner in which the defendants should cross the plaintiffs' line, and the dispute was properly brought before the Railway Committee, who (as counsel agreed upon the argument before me) determined that the provision in the defendants' Act of incorporation forbidding them to cross at grade was beyond the powers of the Provincial Legislature, and not binding upon the defendants, and they have made an order allowing them to cross the plaintiffs' line at grade.

In my opinion this question was one of those for the determination of which the Railway Committee was constituted, and in which, subject to the right of appeal to the Governor-General in Council, or of reference to the Supreme Court, its decisions are by section 21 of the Railway Act made final.

The case of *West v. Parkdale* (1887), 12 App. Cas. 602, decides nothing opposed to this view.

The motion must be refused with costs.

A. H. F. L.

[DIVISIONAL COURT.]

GIGNAC V. ILER ET AL.

Bankruptcy and Insolvency—Preference—Impeaching—Time—Pressure—Voluntary Conveyance—Consideration—Untrue Statement—Proof of True Consideration—Onus—Statute of Elizabeth.

Where there was evidence of a request made to a person in embarrassed circumstances by one who had indorsed notes for him, for a conveyance of an equity of redemption in land, to secure the indorser against his liability, and the first proceeding taken to impeach the conveyance was a seizure of crops upon the land under an execution against the grantor, more than sixty days after the transfer was made :—

Held, that, there having been pressure, the conveyance could not be impeached as a preference.

But, the statement of the consideration in the conveyance being untrue, the onus was upon the grantee to prove beyond reasonable doubt that there was some other good consideration, and his own unsupported statement that such existed was insufficient, and the conveyance must be treated as voluntary, and therefore void under the Statute of Elizabeth.

THIS was an action brought against the sheriff of Essex and his sureties to recover damages for trespass to real and personal property claimed by the plaintiff under the following circumstances :—

On the 15th July, 1895, Messrs. Cameron & Curry recovered judgment against one Antilla and Solomon White for \$327, and placed execution in the sheriff's hands on the same day. Under this execution the sheriff seized twenty acres of corn and two acres of potatoes, all growing upon a farm of which Antilla was in possession. Antilla, himself, came into the sheriff's office and acknowledged them as being under seizure, but no actual seizure was made until the middle of October. The property seized was claimed in October or November by Gignac, the plaintiff in the present action ; the execution creditors took from Solomon White a chattel mortgage in settlement of their claim, and refused to interplead ; but White, being only a surety for Antilla to the execution creditors for the debt upon which the judgment had been recovered, notified the sheriff to proceed with the execution for his benefit, and indemnified him, and the property seized was ulti-

Statement. mately sold by the sheriff to White. The present action was then brought by Gignac against the sheriff and his sureties to recover the value of the crop, as well as damages for trespassing upon the land.

The land upon which the crops were growing had been the property of Antilla, subject to three mortgages amounting to about \$2,100. On 18th June, 1895, Antilla conveyed his equity of redemption to Gignac, the consideration appearing in the conveyance being "an exchange of properties;" but Gignac in his evidence stated that he had indorsed notes amounting to some \$250 for Antilla; that, knowing Antilla was becoming very much embarrassed, he had taken this conveyance from him, intending to sell the crop and pay up the overdue interest on the mortgages with the proceeds, and endeavour to sell the land for enough to help him to pay the notes which he had indorsed for Antilla, who was his brother-in-law. Antilla remained in possession, notwithstanding the conveyance, and on 22nd July, 1895, Gignac made a lease to him of a small part of the property with the house upon it at a rental of \$6 a month. In October, 1895, Antilla left the country, and moved over to Detroit, having marketed some of the property on the farm. The sheriff in his defence set up that the transfer of the property from Antilla to Gignac was colourable and fraudulent against creditors.

The action was tried at Sandwich, on the 1st November, 1897, before MEREDITH, J., without a jury, and he gave judgment for the defendants, upon the ground that the transfer from Antilla to Gignac was a fraudulent preference, and therefore void against creditors.

Against this judgment the plaintiff moved, and the motion was heard on 20th January, 1898, by a Divisional Court composed of ARMOUR, C. J., and STREET, J.

F. D. Davis, for the plaintiff.

Solomon White, for the defendants.

February 10, 1898. The judgment of the Court was Judgment.
delivered by Street, J.

STREET, J.:—

The conveyance from Antilla to the plaintiff of the land upon which the crops in question were growing carried the growing crops with it, and was made on the 18th June, 1895. The execution under which the sheriff justifies the seizure was placed in his hands on the 15th July, 1895, but he made no actual seizure until about the middle of October, when for the first time he sent his bailiff out. What happened on the 27th July, 1895, seems to have been merely this: that Antilla, having heard of the execution, went to the sheriff's office and told the sheriff that he had excellent crops growing which he would harvest and the proceeds of which he would hand over to the sheriff. In October the sheriff heard that Antilla was disposing of the property, and then he sent out and made an actual seizure.

The judgment in favour of the defendants delivered at the trial finds that the conveyance from Antilla to Gignac was void as a fraudulent preference. I am unable to agree in this conclusion. There was evidence of a request on the part of Gignac for the conveyance which was made, to secure him against the liability he was under for Antilla, and the first proceeding taken to impeach the transfer was the actual seizure by the sheriff in October, more than sixty days after the transfer was made. There having been pressure within the authorities, the transfer cannot be impeached as a preference.

The learned Judge, however, leaves open the question as to whether the transaction may not be void under the Statute of Elizabeth, and I have come to the conclusion that we should so hold. The statement of the consideration is untrue, because there was, confessedly, no exchange of properties. The onus is then plainly thrown upon the plaintiff of proving beyond reasonable doubt that there was some other good consideration. He says the considera-

Judgment.
Street, J.

tion really was the intention of Antilla, at his request, to secure him against certain indorsements. Transactions of this nature between relatives are viewed with suspicion, and it has been repeatedly held to be the duty of the person upon whom the onus rests to produce to the Court as satisfactory evidence of the truth of his story as the nature of the case will admit of. The plaintiff has contented himself with giving his own unsupported evidence of the existence of a consideration which contradicts the statement in the deed. He has not called the man who held the note which he says he indorsed for Antilla, and to whom he says he paid part of it—nor has he called Antilla, who has made an affidavit for him upon this motion, and who has been living in Detroit ever since he left Windsor.

Then there is the fact that, notwithstanding the conveyance, Antilla remained in possession of the property, without any apparent right to be there, until he got a lease a month later. Antilla seems to have worked at the harvesting and selling of the crop as if it were his own. It is true Gignac says he was paid wages for doing so, but here again his evidence might have been but is not corroborated.

In a word, the consideration set forth in the deed is untrue, and we have only the plaintiff's unsupported statement of any other. Under these circumstances, I think we must treat the evidence of the existence of any consideration as insufficient, and treat the conveyance as being voluntary. Treated as a voluntary conveyance, it plainly cannot be upheld, and the motion should, therefore, be dismissed with costs.

E. B. B.

BEAULIEU V. COCHRANE ET AL. *

Trade Union—Expulsion of Member—Fine—Deprivation of Benefits—Action—Bar—R. S. C. ch. 131, sec. 4—Libel—Privilege.

An action by a member of a trade union, having a monetary interest in its funds, against certain of his fellow-members for unlawfully imposing a fine upon him, and expelling him in default of payment, and depriving him of benefits, is within the prohibition of sec. 4 of the Act respecting Trades Unions, R. S. C. ch. 131, providing that the Court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members.

Rigby v. Connol (1880), 14 Ch. D. 428, followed.

The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed :—

Held, that the publication was not privileged.

THE plaintiff, a stone-cutter, brought this action against Statement. certain other stone-cutters, members with him of the Rockland branch of the Journeymen Stone-cutters' Association of North America, to recover damages for an alleged conspiracy, and for unlawfully imposing a fine upon him, and expelling him from the association, and depriving him of the benefits of the association, and for libel.

The statement of claim alleged : (4) that the plaintiff and the defendants were in the employment of one Stewart, a contractor, when the latter employed a certain boy as an apprentice in violation of the rules of the association ; (5) that a strike was thereupon ordered by the association, and, after it had lasted some time, the defendants, wishing to get back into Stewart's employment, formed a scheme and conspired to lay the blame of the strike upon the plaintiff ; (6) that, acting in pursuance of their scheme, the defendants falsely and maliciously charged the plaintiff with being the sole cause of the strike, whereas in truth and in fact he had nothing to do

Statement. with it; (7) that, in further pursuance thereof, the defendants maliciously caused the branch association to impose a fine of \$150 upon the plaintiff, which they knew him to be unable to pay, and expelled him from the association, and prevented him from being retained in the service of Stewart, and from being employed elsewhere; (8) that this was all procured to be done by the defendants maliciously and without reasonable or probable cause, and without any proper investigation, and without affording the plaintiff any opportunity to be heard in his own defence; (9) that the defendants refused to review or reverse their action or reconsider it, unless the plaintiff paid the \$150, which they well knew he was unable to do; (10) that the defendants also falsely and maliciously printed and published of the plaintiff in the journal of the union, and caused to be circulated throughout its branches and otherwise, a false, scandalous, and malicious libel to the effect that the trouble would not have occurred but for the treachery of the plaintiff, who had richly deserved the fine imposed upon him. For these alleged wrongs the plaintiff claimed \$3,000 damages.

The facts are stated in the judgment.

The action was tried by **MACMAHON, J.**, without a jury, at Ottawa, on the 1st December, 1897.

Belcourt, for the plaintiff.

T. McVeity, for the defendants.

February 3, 1898. **MACMAHON, J.** :—

The plaintiff and the defendants are stone-cutters, and all were members of the Rockland (county of Carleton) branch of a Trades Union, known as the Journeymen Stone-cutters' Association of North America; the defendant Clancy, at the time of the grievances complained of, being president, Rochou, vice-president, and DeLong, treasurer, of the Rockland branch.

Article 2 of the constitution defines the objects of the

association to be : "To rescue the trade from the dangers surrounding it, and by mutual effort to place ourselves on a foundation sufficiently strong to prevent further encroachment. We propose to establish an apprentice system, to encourage a higher standard of skill, and to cultivate a feeling of friendship among the men of our craft."

Judgment.
MacMahon,
J.

All the parties to the action, together with a large number of other stone-cutters, members of the union, were employed in Andrew Stewart's quarries, at Rockland, the number, however, being less than one hundred. By article 6, sec. 7, of the by-laws of the union, in no case shall the number of apprentices exceed two in any yard where there are less than one hundred men employed, and stone-cutters' sons are in every case to be preferred.

Stewart, the owner of the quarry, never recognized the union.

The plaintiff was employed by Stewart in the spring of 1895, at \$3 a day. At the time the plaintiff went to work at the Rockland yard, there were two apprentices there, and a short time after the plaintiff commenced working a boy named Larocque was brought to the yard to work as an apprentice, and the plaintiff was accused by some of the stone-cutters in the yard of bringing, or causing Larocque to be brought, there. In consequence of this third apprentice being brought to the yard, the sixty-three men then at work therein went out and remained out on strike some four or five weeks. Before the strike Stewart said to the stone-cutters that the boy Larocque would work there, and if they did not like it, they could all go home.

The defendant Cochrane stated at a meeting of the Rockland branch of the union, at which the plaintiff was present, that O'Toole, the foreman for Stewart, had told him that the strike had been brought about by the plaintiff, who had caused Larocque to be brought there. I find that Stewart engaged Joseph T. Larocque, the apprentice, at the solicitation of his father, H. Larocque, and that Stewart sent the boy to the yard, he being taken there by

Judgment. his father, and that the plaintiff had no act or part either
MacMahon, in promoting Larocque's engagement by Stewart or in
J. bringing him to the yard.

At the meeting referred to, when the defendant Cochrane accused the plaintiff of bringing the boy Larocque to the yard, the plaintiff emphatically denied that he had anything to do with Larocque's being brought there; and a committee was appointed at that meeting, composed of the defendants Clancy, Cochrane, and others, to interview H. Larocque, the father of the apprentice, and ascertain from him if the plaintiff had done anything to induce him (Larocque) to let his son come to the stone-cutters' yard. The plaintiff promised to remain at Rockland while the committee went to Ottawa to make inquiries from the elder Larocque in respect to his son's engagement at the yard, and to find out if the plaintiff was accessory in any way to his (Larocque's) son being brought there. The plaintiff did not, however, remain in Rockland, but went immediately to Larocque's house, which he reached prior to the arrival there of the committee, but Larocque being absent, neither the plaintiff nor the members of the committee saw him. The committee returned to Rockland the same evening, and on their return reported to a meeting of the members of the union that the plaintiff had gone to Larocque's in violation of what they considered his undertaking to remain in Rockland, and a resolution was moved, which was passed almost unanimously, that the plaintiff was guilty of violating the rules of the association in bringing a third apprentice to the yard, and he was for such alleged offence fined \$150, under the authority supposed to be conferred by secs. 1 and 2 of article 3 of the by-laws of the association, which provide: "(1) Any member who has ever committed himself by working contrary to the constitution of this or any other association shall not be entitled or allowed to hold any of the general offices, and any such member shall not be elected as a delegate to the general convention. (2) Any member who has committed himself shall be dealt with at the

discretion of the branch wherein the offence was committed. But in no case is the fine to be less than \$50 (fifty dollars) or more than \$150 (one hundred and fifty dollars). No part of said fine to be remitted.”

Judgment.
MacMahon,
J.

At the meeting, the plaintiff having denied all connection with Larocque's engagement to come to the yard, the duty of the committee was to procure information from Larocque's father; and, not having seen him, the members of the committee were not in a position to report to the members of the union, as they had no more information than they were possessed of prior to their being appointed. What the plaintiff had done in going to Larocque's in advance of the committee may to them have appeared a suspicious circumstance, but it could of itself form no evidence whatever in proof of the charge against him, and it was only upon some proof of such charge being true that any action could properly be taken.

Where, as in the case of this association, a domestic tribunal is provided for dealing with matters relating to the discipline of its members, and for securing the good government and welfare of the organization, such tribunal is not fettered by the rules of evidence as applied in Courts of law, so that such tribunal, as said in *Hands v. Law Society of Upper Canada* (1888), 16 O. R. at p. 632, "may be well content to proceed on what has been happily called 'human evidence,' i.e., the evidence on which men transact the ordinary business of life." But, nevertheless, they are bound to act, as said by Lord Hatherley in *Dean v. Bennett* (1870), L. R. 6 Ch. at p. 495, "according to the ordinary principles of justice." No notice was given to the plaintiff of the meeting at which the resolution imposing the fine was passed, and the members of the union, in passing the resolution on the statement made by O'Toole to the defendant Cochrane as to the plaintiff being the cause of Larocque's engagement as an apprentice, were merely acting on hearsay. The plaintiff had denied that there was any foundation for O'Toole's statement, and O'Toole was not produced before the meeting of the union, and the plaintiff

Judgment.
MacMahon,
J.

had therefore no opportunity afforded him of confronting O'Toole or controverting the statement he had made. Lord Hatherley said in the case to which I have already referred : " No one would expect to find that such a course had been adopted in any assembly of English people, who are accustomed in some degree to the ordinary principles of justice, though they may not have any accurate idea of its form." And Jessel, M. R., in *Fisher v. Keane* (1879), 11 Ch. D. at pp. 362-3, said " that a man ought not to be convicted of a grave offence which shall warrant his expulsion from the club, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him. They ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever—perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct." Had the members of the committee not been so precipitate in their action, but waited until the instructions received from the meeting of the members had been carried out by communicating with Larocque, sr., they would have ascertained from him that it was he who had procured from Stewart employment for his son, and that the plaintiff had no connection with obtaining such employment for the apprentice.

There is no authority given by the constitution to impose the fine that was inflicted on the plaintiff by the resolution in question. Section 1 above set out is aimed at one class of offenders, viz., members who had committed themselves by working contrary to the constitution. Then a member who has so committed himself may, at the discretion of the branch, have a fine imposed, as provided there, not exceeding \$150.

It was not alleged or pretended that the plaintiff committed himself by working contrary to the constitution. His course was the opposite of that. When the strike was proclaimed, he went out with his fellow workmen and remained out until it terminated.

The action of the defendants was certainly most inconsiderate and unjust toward the plaintiff, yet there is no evidence warranting me in finding that they had entered into a conspiracy to inflict a fine and thus cause his expulsion from the club.

Judgment.
MacMahon,
J.

The plaintiff is interested (article 7, sec. 4, of by-laws of association) in the death benefit fund to the extent of \$100, which sum his family or personal representative would be entitled to receive if he died while a member in good standing. He was also interested in the sinking fund (article 23) to maintain members of a branch while on strike. But, notwithstanding this, and notwithstanding the fact that the action of the domestic tribunal in imposing a fine was wholly illegal, and was virtually an expulsion of the plaintiff from the union, he is without redress from the legal tribunals of the country in respect of such alleged causes of action. By the Act respecting Trades Unions, R. S. C. ch. 131, sec. 4, a Court is not "to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any of the following agreements, that is to say :—

* * * * *

(3) Any agreement for the application of the funds of a trade union,—

(a) To provide benefits to members."

The effect of the Imperial Act 34 & 35 Vict. ch. 31 (of which our Act is almost a literal transcript) was considered in *Rigby v. Connol* (1880), 14 Ch. D. 482, the head-note to which is: "The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a 'foul shop' (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The plaintiff, a member of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay

Judgment. the fine, had been expelled from the union, brought his action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation :—Held, that as the action was brought to enforce an agreement between members of a trade union ‘to provide benefits to members,’ within the meaning of the Trades Union Act, 1871, sec. 4, which the Court was not by that section enabled to enforce ; and as, apart from the Act, the union was an illegal association, the plaintiff was not entitled to any relief.”

MacMahon,
J.

Sir George Jessel, M.R., in the course of his judgment, at pp. 490-1, said : “I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less * *. The question, therefore, which I have to consider is, what would have happened without the Act ? And it appears to me that without the Act it is clearly an unlawful association ; it is an association by which men are not only restrained in trade, but they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union but to another union. That is the allegation. And the rule is that any man binding his son in a ‘foul shop,’ which, as it has been explained to me, includes a shop of this description, where the members employed belong to another union and not to this union, shall be fined £5, and so on according to the rules. I see a great number of other stipulations of a character which are not only a restraint in trade, but so much in restraint

of trade, limiting the subject of it, that I have no doubt that before this Act was passed these rules would have been altogether illegal; and if nothing in the Act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a Court of Justice to assist him to enforce his rights under that illegal association." See also the judgment of the same learned Judge in *Russell v. Russell* (1880), 14 Ch. D. at p. 478, citing a passage from Lord Chief Baron Kelly's judgment in *Wood v. Woud* (1874), L. R. 9 Ex. at p. 196.

Judgment.
MacMahon,
J.

The lock-out committee, of which the defendant Clancy, the president, and J. E. Cochrane were members, on the 4th April, 1895, notified Mr. Stewart, the owner of the quarries, that the strikers, after investigation, had to admit that the strike was caused through the misrepresentation and bad faith of one of their number, and not through any unfair dealing on the part of him (Mr. Stewart). The members of the committee were then told by Mr. Stewart that he had engaged the apprentice to work and had sent him to the yard, and that he (Stewart) intended he should work there, despite the charter and constitution of the union, and that the plaintiff, Beaulieu, had nothing to do with bringing the apprentice Larocque there. With this intimation from Stewart, the defendants Clancy and Cochrane (with three other members of the committee, who are not defendants in this action), on the 9th April wrote and caused to be published in the April and May numbers of "The Stone-cutters' Journal," published in Washington, which has a large circulation amongst the stone-cutters in Canada, the libel set out in the tenth paragraph of the statement of claim.

The defendants pleaded that the statements were true and that the publication was privileged. The statements published were not true, and, after being told by Mr. Stewart, their employer, that he alone was responsible for the hiring of Larocque, they could not, as reasonable men, have believed the statements they were making against

Judgment. the plaintiff in the article published to be true. There
"MacMahon, was therefore no privilege.
J.

By reason of the publication of the libel, it was impossible, in many instances, for the plaintiff to procure work, or to remain at work with contractors, because of the threatened strike by the other stone-masons, as he was branded as a "scab," by reason of not having paid the fine imposed by the union. See *Trollope v. London Building Trades Federation* (1896), 12 Times L. R. 373; *Newton v. Amalgamated Musicians' Union* (1896), *ib.* 623.

There will be judgment for the defendants dismissing all the causes of action in the statement of claim except the cause of action mentioned in the tenth paragraph thereof, without costs. And I direct that judgment be entered for the plaintiff as against the defendants Clancy and Cochrane in respect of the cause of action in the tenth paragraph of the statement of claim, for the sum of \$300, with costs.

E. B. B.

[DIVISIONAL COURT.]

M'BRIDE V. HAMILTON PROVIDENT AND LOAN SOCIETY
ET AL.

Distress—Mortgagor and Mortgagee—Decease of Mortgagor—Seizure of Stranger's Goods on Mortgaged Land—Authority of Bailiff—Principal and Agent—Interference of Agent in Distress—Evidence—Admissibility—Solicitor's Letter before Action.

Mortgagees, by their warrant, authorized their bailiff to distrain the goods of the mortgagor upon the mortgaged premises for arrears due under the mortgage. The mortgagor being dead, the bailiff seized the goods of a stranger upon the premises :—

Held, that he was acting within the scope of his authority, as agent for a principal, in making the seizure upon the premises, and the mortgagees were liable for his act.

Lewis v. Read (1845), 13 M. & W. 834, and *Haseler v. Lemoyne* (1858), 5 C. B. N. S. 530, followed.

Held, also, that there was evidence upon which the jury might properly find that a local appraiser of the mortgagees was their agent for the purpose and interfered in and directed the seizure, after being informed that the goods were not those of the deceased mortgagor.

Seem, that a letter written before action by the solicitor of the defendants to the solicitor for the plaintiff was improperly received in evidence.

Wagstaff v. Wilson (1832), 4 B. & Ad. 339, referred to.

THIS was an appeal by the defendant company from the judgment of the junior Judge of the County Court of the county of Lambton in favour of the plaintiff, upon the findings of the jury, for \$125 damages and for costs, in an action for the wrongful seizure of the plaintiff's goods under colour of a distress. Statement.

The defendant company were mortgagees of the farm upon which the goods were seized under a mortgage from one Mary Ann McBride. The mortgage being in arrear, the defendant company gave a warrant to the defendant Hubble, as their bailiff, to distrain the goods of the mortgagor upon the mortgaged premises, a license to distrain being contained in the mortgage deed. The defendant Hubble on the 9th November, 1896, went upon the premises, and seized the goods of the plaintiff, the mortgagor having been then dead for some years, though this was not known to the defendant company. The plaintiff was

Statement. an adopted son of the mortgagor, and remained upon the premises after her decease. The defendant Hubble, when he came to distrain, was accompanied by one Stone, who was a local appraiser for the defendant company. The jury found that Stone was the agent of the defendants and that he instructed the seizure after he had been told that the goods were the plaintiff's. Four or five days after the seizure the defendants abandoned it.

The appeal was heard on the 15th February, 1898, by a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ.

P. D. Crerar, for the defendant company. There was no case to go to the jury as against the defendant company. They had the right to issue their warrant to distrain the goods of their mortgagor. It was said that Stone was an agent of the company, and was told by one Reynolds that he had no right to seize the goods, but that was not evidence against the company. Neither he nor the bailiff was the company's agent to seize the goods of the plaintiff, under a warrant to distrain the goods of another: *Lewis v. Read* (1845), 13 M. & W. 834. The company abandoned as soon as they knew the goods were the plaintiff's. There was no evidence that Stone took any part in the distress. There was a letter from the company's solicitor, in which Stone was spoken of as an agent, but that was improperly received in evidence, as it was written before action: *Wagstaff v. Wilson* (1832), 4 B. & Ad. 339. There was no evidence that the company authorized the communication.

Aylesworth, Q.C., for the plaintiff. The question of the admissibility of evidence is not open upon this motion. The Court cannot entertain a motion for a new trial in this case: R. S. O. 1897 ch. 55, sec. 51. The evidence shews that Stone was an agent of the company to see that debtors paid, and he certainly interfered and controlled the seizure. See *Moore v. Drinkwater* (1858), 1 F. & F. 134.

Crerar, in reply.

March 3, 1898. ROSE, J. :—

Judgment.

Rose, J.

We have not to consider in this case any question of misdirection, nondirection, or improper reception of evidence, or excessive damages. The society does not desire a new trial, but asks the Court to enter judgment for it, on the ground that there was no evidence to go to the jury to support the plaintiff's claim.

The first question which arises is as to the liability of the society for the act of the bailiff. The warrant was under the hand and seal of the society, addressed to the defendant Hubble as bailiff, and authorizing him to distrain the "goods, chattels, and all personal property whatsoever owned by Mary Ann McBride in and upon the house, farm, lands, and premises of said Mary Ann McBride, situate and being the west halves of lots numbers 1 and 2 in the front concession of the township of Moore," etc. The distress was for arrears under a mortgage to the society. Unknown to the society, at the time of issuing the warrant, Mary Ann McBride was dead. The goods seized upon the premises in question belonged to the plaintiff. It is clear that the intention was to seize the goods upon these premises, and I think the bailiff was acting within the scope of his authority, as agent for a principal, in making the seizure upon the premises, and that the society was liable for his act, although the mortgagor was dead, and although the title in the goods and chattels had passed to another.

The case of *Lewis v. Read* (1845), 13 M. & W. 834, is an authority in the plaintiff's favour. In that case there was a distress of a number of sheep, the property of the plaintiff, who was a brother of the tenant, the defendant being the landlord. Some of the sheep seized were upon the premises leased to the plaintiff's brother; some were on an adjoining property. The question was as to the liability of the defendant for the distress of the sheep off the demised premises. Baron Parke said that "the taking of the sheep on the demised premises was within the original authority given to the bailiffs."

Judgment.

Rose, J.

In *Haseler v. Lemoyne* (1858), 5 C.B.N.S. 530, where the question was as to the liability of the landlord for a tortious act of the broker, Williams, J., said: "It is quite consistent with the view we take, that the landlord is not liable for the acts of the bailiff in distraining upon premises other than the demised premises, or for seizing things not by law distrainable. But where, as here, he takes the goods *which it was meant he should take*, the landlord is liable for any irregularity committed by him in the conduct of the distress."

But, assuming that this view is not tenable, the next question is: did the society interfere with the making of the distress? That depends upon whether one Stone was the agent of the society for the purpose of directing Hubble, the bailiff. What Stone did was, if the evidence for the plaintiff is believed, and we must take it to have been believed, quite sufficient to make the society liable, for he was present when the distress was made, accompanied the bailiff when the bailiff was making the inventory, was told that Mrs. McBride, the deceased mortgagor, did not own the chattels, answered that he did not care, that they were on the place, wrote out the inventory and advertisement, and acted so as to convey the impression to the plaintiff that he was in control and management. As put by Reynolds, the first witness for the plaintiff, "he seemed to come there purposely to seize." An offer was made to him by Reynolds to give him the hay and barley that were in the granary, for Stone to sell, if he could, at a fair price, and to have it delivered wherever he wished within reach, and that he might draw the money to satisfy the claim. This Stone declined. In fact it was not argued that his conduct was not such as would bind the company if he was an agent of the company for the purpose of interfering with or directing the distress. Hubble, the bailiff, could not say whether he received his warrant directly from the society or from Stone. Stone was the agent of the society for certain purposes. The answer of William Stewart, an officer of the society, to the following question, was as fol-

lows: "Q. Now, what is this man your agent for? A. For inspecting lands, and in case a man is behind to call upon him and see what shape he is in, and *to see that it is paid.*"

Judgment.

Rose, J.

After the distress was made, a formal notice of claim was served upon the bailiff, Hubble; he immediately forwarded it to the society. The society wrote to Stone, giving instructions to abandon the seizure. These instructions were conveyed to Hubble, who then formally abandoned. I cannot say upon this evidence that there was not a question to submit to the jury as to the authority of Stone to act in directing and controlling the distress.

I have not referred to the letter written by the solicitor of the society to the solicitors of the plaintiff before action. Without very fully considering the question, I am very doubtful indeed if this letter was properly receivable in evidence; indeed, I think it was not. The case of *Wagstaff v. Wilson* (1832), 4 B. & Ad. 339, is an authority in the society's favour on that question. But, as I have said, we are not here considering the question of a new trial.

It may be a question whether, having regard to the general authority or instructions of Stone, and the part he played in the matter, and to the fact that the society did not call him as a witness at the trial, the jury might not have drawn an inference unfavourable to the defendant as to his agency and authority. Without expressing any opinion on the point, I refer to the observations of Lord Esher, M. R., in *Tate v. Latham & Son*, [1897] 1 Q. B. at p. 509; I give the following extract: "The question therefore arises whether there was evidence that Cook was a person intrusted by the defendants with the duty of seeing that the machinery was in proper condition. I think there was. There was evidence that he acted as a person intrusted with that duty, for the evidence was that he told the plaintiff to make a guard for the machine, because the factory inspector was coming round. He therefore acted as if it was his duty to see that the machine had a proper guard, and he was not called by the defendants. It seems to me that there was evidence on which the jury might

Judgment. find that Cook was a person intrusted by the defendants with the duty of seeing that the machinery was in proper condition."
Rose, J.

The damages in this case seem to be very liberal, but with that we have nothing to do. I think the motion fails, and must be dismissed with costs.

MEREDITH, C. J. :—

I concur.

MACMAHON, J. :—

Having regard to the grossly excessive damages awarded by the jury, I much regret that no relief can be afforded the defendants.

This action having been tried by a jury, we have no power to grant a new trial in a County Court case: R. S. O. 1897 ch. 55, sec. 51. But, even had we the power, the defendant society was unwilling to accept the doubtful advantage resulting from its exercise in its favour.

The actual damage suffered by the plaintiff was almost infinitesimal. The plaintiff was the adopted son of Miss McBride, the owner and mortgagor of the land to the defendant society, on which the distress was made. The interest on the mortgage had been in arrear for several years, and Miss McBride, the mortgagor, had, at the time of the distress, been dead for three years. The plaintiff had, therefore, been in possession of the farm for three years without paying interest on the mortgage or rent therefor. The bailiff had been in possession under the distress for only seven days, and during that time the plaintiff had been allowed to use, when required, the horses seized; the cows had been milked, and the plaintiff received the benefit of the milk; so that no actual damage was suffered by him. It must, therefore, remain one of those inscrutable things how the damages were assessed at \$125.

Actions of this nature are now almost invariably tried without the intervention of a jury, and it has been found in the interest of justice that they should be so tried, as it has in so many instances been made apparent that an un-reasoning prejudice exists in the minds of some jurors against landlords and mortgagees.

Judgment.
MacMahon,
J.

E. B. B.

[DIVISIONAL COURT.]

REILLY V. McILLMURRAY.

Lien—Trainer of Animal—Continuing Possession—Discontinuance of Possession—Resumption.

- A continuing right of possession of the animal must accompany the services rendered by a trainer for which he claims a lien on a horse which he has trained in order to render such lien valid.
- A trainer who had delivered up possession of a horse which he had been training, to the administratrix of the owner from whom he had received it, and who afterwards resumed possession under a new agreement with the administratrix to take care of the horse was held to have lost any lien he might have had.

THIS was an appeal from the County Court of the county of York in an action of replevin brought by the administratrix of the estate of George W. Reilly, deceased, against James McIllmurray for the recovery of a mare and harness.

Statement.

The defendant pleaded a lien for services and expenses.

The action was tried on October 20th, 1897, before His Honour Judge McDougall, without a jury.

Edward Meek, for the plaintiff.

A. F. Lobb, for the defendant.

At the trial the defendant relied upon an agreement with the deceased George W. Reilly for payment of \$4 a

Statement. week to defendant to train the mare to run in the Grange steeplechase in May, 1897, in Toronto, and to ride her at the race and to be paid an extra fee therefor.

There was a conflict of evidence as to whether the defendant had under the agreement exclusive and continuous possession of the mare. It appeared that upon one occasion at least during his lifetime the owner had gone to the defendant's stable, apparently as of right, hitched her up, drove her away and brought her back the same day; and there was evidence that he had taken her away on other occasions, but this the defendant denied.

After the death of the owner the administratrix concluded to offer the mare for sale at a sale stable in Toronto. At the request of the solicitor for the estate the defendant took her to the sale stable and left her there for a week and rode her once or twice to shew her to prospective buyers. The mare was not sold. The solicitor for the estate on behalf of the administratrix then directed the defendant to take her back to his stable and arranged with him to care for her for \$3 a month.

The learned County Court Judge found that the defendant had a lien for his services and expenses and that the lien revived when he got the mare back from the sale stables and referred to *Milburn v. Milburn* (1848), 4 U. C. R. 179; *Huffman v. Waterhouse and Broddy* (1890), 19 O. R. 186.

From this judgment the plaintiff appealed and the appeal was argued on February 1st, 1898, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

O'Donohoe, Q.C., for the appeal contended that the evidence shewed the defendant had no such continuous possession of the mare as would entitle him to a lien and that even if he had he lost his lien when he took her to the sale stable and left her there for sale and referred to Cross's Law of Liens, pp. 2, 48; Montagu's Law of Liens, p. 17;

Hedgley v. Holt (1829), 4 C. & P. 104; *Forth v. Simpson* Argument. (1849), 13 Q. B. at p. 685; *Hartley v. Hitchcock* (1816), 1 Starkie 408.

A. F. Lobb, contra, contended that even if the defendant had permitted the owner to use the mare he had not parted with possession for more than a temporary purpose and the lien would not thereby be waived: that the defendant had taken the mare to the sale stable under the direction of the solicitor for the estate and ridden her to shew her there: that the mare was still under the defendant's control and he could as against the vendor assert his lien at any time before delivery to a purchaser: and even if lost, the lien revived when the defendant took the mare back from the sale stable and cited *Ex p. Willoughby, In re Westlake* (1881), 16 Ch. D. 604; Jones on Liens, sec. 698; Oliphant's Law of Horses, 5th ed., 218, 219; *Bevan v. Waters* (1828), Moo. & M. 235.

February 7th, 1898. The judgment of the Court was delivered by

ARMOUR, C. J. (after reviewing the evidence):—

It might well be doubted upon the evidence whether ever such an agreement as was alleged to have been made between the intestate and the defendant was made, but assuming that it was made whether a lien arose in favour of the defendant by reason thereof must depend upon the nature of the possession the defendant had of the mare.

In *Jacobs v. Latour* (1828), 5 Bing. 130, the point arose whether a trainer of race horses had a lien on the horses for his services in training, but the case went off on another point.

In *Bevan v. Waters* (1828), Moo. & M. 235, Best, C. J., said, at p. 236: "I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races": S. C., 3 C. & P. 520. See also *Sanderson v. Bell* (1834), 2 Cr. & M. 304; S. C., 4 Tyr. 244; *Judson v. Etheridge* (1833), 1 Cr. & M. 743.

Judgment. In *Scarfe v. Morgan* (1838), 4 M. & W. 270, Alderson, B., Armour, C.J. said, in the course of the argument, at p. 276: "It may be very doubtful whether the trainer would not be considered to be in the situation of the livery stable keeper, if by the contract he is to allow the owner to run the horse," and Parke, B., in delivering the judgment of the Court, said, at p. 283: "The principle seems to be well laid down in *Bevan v. Waters*, by Lord Chief Justice Best, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horse breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges." * * "It is clear that, even in such cases, if the nature of the contract applicable to such skill or labour be inconsistent with the lien, that the latter, which is but a stipulation annexed impliedly to the contract, cannot exist." * * "In the case of the livery stable keeper there is such an inconsistency, because, by the nature of the contract itself, the possession is to be redelivered to the owner whenever he may require it." * * "The doubt as to the case of the trainer, in *Jacobs v. Latour*, turns on this. There the question is, whether in the contract for training, there is a stipulation for the redelivery of the horse trained for the purpose of racing."

In *Jackson v. Cummins* (1839), 5 M. & W. 342, Parke, B., said, at p. 350: "As to the case of the training groom it is not necessary to say anything, as it has not been formally decided; for in *Jacobs v. Latour*, the point was left undetermined. It is true there is a *nisi prius* decision of Best, C. J., in *Bevan v. Waters* that the trainer would have a lien, on the ground of his having expended labour and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the Judge, nor was the usage of training to that effect explained to him, that

when horses are delivered for that purpose, the owner has always a right, during the continuance of the process, to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right which overrides it; so that I doubt if that doctrine would apply when the animal delivered was a race horse, as that case differs much from the ordinary case of training. I do not say that the case of *Bevan v. Waters* was wrongly decided; I only doubt if it extends to the case of a race horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply."

Judgment.

Armour, C.J.

In *Forth v. Simpson* (1849), 13 Q. B. 680, Lord Denman, C. J., said, at p. 684: "I have little doubt that the care and skill employed by a trainer upon a race horse are of such a nature as would, on general principles, give a right of lien. But it is essential to a lien that the party claiming it should have had the right of continued possession. * * The circumstances of this case, therefore, make it like the case of a livery stable keeper; for it is immaterial whether the owner's possession be more or less, if he has a right to assert it at all, and to interrupt the possession of the party claiming the lien." Patteson, J., said, at p. 685: "I have no doubt that according to the general principles of lien, and independently of contract or usage, which may qualify any particular case, a trainer of race horses employs that sort of skill and labour which would entitle him to a lien. But this is not the only consideration; to complete the right of lien there must be the continuing right of possession. Whether there is such a right of possession in any case must depend on the nature of the particular contract or custom applicable to the subject matter." Coleridge, J., said, at p. 685: "I also have no doubt that the skill and labour of a trainer are a good foundation for a lien; because he educates an untaught animal, and otherwise adapts it for a particular purpose, and thereby greatly improves its value. But it is a well established principle that, without the right of continuing

Judgment. possession, there can be no right of lien." Erle, J., said, at Armour, C.J. p. 686: "The principles which govern this case are clear. A trainer of race horses has the benefit of one general principle, that the person exercising care and skill in the improvement of a chattel is entitled to a lien on such chattel for his charges in respect of his care and skill. But there is another general principle; that in order to complete a right of lien, there must be a continuing right of possession."

I think that in this case there was no right of continuing possession in the defendant; for I think that it was part of the understanding between the intestate and the defendant, that the intestate should be at liberty to use the mare whenever he desired to do so; and this is to be inferred from the fact that he did use it whenever he came to town according to the evidence of the plaintiff and several times according to the evidence of the plaintiff and Mr. O'Donohoe, which evidence I think outweighs that of the defendant, who himself admits that the intestate on one occasion came and hitched up the mare, doing so apparently as of right and without asking the consent of the defendant and drove her away; and when the defendant received orders from Mr. O'Donohoe on behalf of the plaintiff to take the mare to Grand's Repository,* he did so without claiming any right to the continuing possession of her and without any objection whatever.

I am of the opinion, however, that the lien of the defendant, if he had any, was lost by his delivering the mare at Grand's Repository by the orders of the plaintiff, where she remained at the cost of and at the control of the plaintiff: see *Hartley v. Hitchcock* (1816), 1 Starkie 408.

The evidence in my opinion shews that the defendant at that time gave up complete possession of the mare to the plaintiff.

It is quite clear also in my opinion, that the subsequent possession of the mare by the defendant did not operate to

* The sale stable.

revive the lien, if any; for the subsequent possession was Judgment. taken under an agreement made by the plaintiff with the Armour, C.J. defendant that he was to take the mare and take care of her for \$3 a month. This was an entirely new agreement with a different person, under which the plaintiff was personally bound and under which the defendant was bound upon the termination of the bailment thereby made to deliver up the mare to the plaintiff.

It could not be contended that the defendant had any lien under the terms of this agreement.

The appeal must, therefore, be allowed with costs, and judgment must be entered for the plaintiff in the Court below for a return of the mare and harness and five dollars damages with full costs of suit.

G. A. B.

[DIVISIONAL COURT.]

ARMSTRONG ET AL. V. HARRISON.

Trusts and Trustees—Estate—Temperance Society—Locality—New Societies.

A grantor, by deed, conveyed certain land to three trustees in trust for certain societies at a named place and their successors, representatives of the aforesaid societies, or the representatives of the said societies (*sic*) of any temperance society by whatever name it or they might be known or designated. Together with all * * the estate, right, title * * of the grantor, his heirs or assigns, *habendum*, unto the said trustees and their successors in trust for said societies, or such of them as may continue to exist. * *

The three temperance societies mentioned in the deed had all ceased to exist for many years :—

Held, that the trustees took only a life estate for their joint lives and the life of the survivor of them, leaving the reversion in fee in the grantor :—

Held, also, looking at the situation of the premises and the uses for which they were intended, and that the temperance societies originally named were all formed in a certain place, that although the trust was intended to be confined to temperance societies having the some local habitation, the words in the *habendum* were large enough to include any temperance society founded at that place while any of the original grantees were living :—

Held, also, that the plaintiff having been appointed a trustee for such a society, although no such appointment could extend or prolong the life estate granted, was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises, which he had commenced to do.

Statement. THIS was an appeal from the County Court of the county of Halton.

The action was brought by William J. Armstrong and David Robertson, representing the Milton Council of Royal Templars of Temperance, No. 61, against James Harrison, to restrain him from pulling down or interfering with a temperance hall in the town of Milton or exercising any acts of ownership with respect to it or the land upon which it was erected.

The action was tried at Milton, on October 22nd, 1897, before His Honour Judge HAMILTON, without a jury.

T. G. Matheson, for the plaintiffs.

J. W. Elliot, for the defendant.

It appeared that by deed dated the 20th day of September, 1856, made between one John Martin, of the first part, Margaret Martin, his wife, of the second part, and James Harrison (the defendant), Socrates Centre and George Brown, "trustees in trust for the Sons of Temperance at the town of Milton aforesaid, the society of Good Templars at the town of Milton aforesaid, and the Milton Temperance Society at the town of Milton aforesaid," of the third part, the said party of the first part in consideration, etc., "did give, grant, bargain, sell, alien, release, enfeoff, convey and confirm, * * unto the said parties of the third part and their successors, representatives of the aforesaid societies, or the representatives of the said societies of any temperance society by whatever name it or they may be known or designated, all and singular (the property in question). Statement.

"Together with all and singular the houses * * and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, * * of him the said party of the first part, his heirs or assigns.

"To have and to hold the said lands * * unto the said parties of the third part and their successors in trust for said societies, or such of them as may continue to exist, or to the representative or representatives of any temperance organization having for its object, design and labours for the suppression of the traffic and use of spirituous liquors by whatever name such organization may be known; such successors to be appointed by each and every of said temperance organizations as follows: that is to say, by a majority of votes of the members of said temperance organizations who have had their names enrolled on the books of the society and have been in good standing in said society at least six months prior to the time of voting, and each of said societies to elect one as their representative in said trust, and any and all vacancies in said trust, either by death, removal, resignation, violation of the rules of the society or dismissal, such vacancy shall be filled

Statement. up by a member of the society in which the vacancy has occurred, * * and if at any time any misunderstanding shall arise respecting the use or control of said premises, or any part thereof, then such misunderstanding or difference shall be settled by arbitrators * * .”

The then temperance societies mentioned in the deed had all ceased to exist for some twenty years.

The plaintiffs were chief officer and representative respectively of the Milton Council of Royal Templars of Temperance, No. 61, a new temperance unincorporated organization which had been in existence for fifteen years.

Two of the trustees, George Brown and Socrates Centre, were dead, and the defendant James Harrison was the sole surviving trustee named in the deed.

The premises in question had not been used by any temperance organization for years, and the defendant sought to pull down the building.

The statement of defence set up that the trust was void for uncertainty and contravened the law as to perpetuities.

The learned County Judge decided that the plaintiffs' claim was such “a misunderstanding or difference” as was contemplated by the trust deed and should have been settled by “arbitrators,” to be appointed as therein directed, and that the plaintiffs had failed to prove they were elected “trustee” or “representative” in mode and form by the specially qualified class entitled to vote for that object as directed in the deed, and that it had not been shewn that any temperance organization had been excluded from or refused the enjoyment of the trust premises by the defendant, and dismissed the action with costs.

From this judgment the plaintiffs appealed, and the appeal was argued on February 2nd, 1898, before a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

H. Osler, for the appeal.

Bicknell, and *J. W. Elliot*, contra.

February 7th, 1898. The judgment of the Court was delivered by Judgment.
Street, J.

STREET, J. :—

The conveyance in which the trusts here in question are contained has been drawn by some one who was unable to express clearly what he meant. He has failed to convey from the grantor John Martin to the grantees James Harrison, Socrates Centre and George Brown, the fee simple in the land.

What they took was an estate only for their joint lives and the life of the survivor, leaving the reversion in fee in the grantor. The estate will continue only during the life of the defendant Harrison, who is the sole survivor of the three original grantees. The grantees are described as trustees in trust for three temperance societies (not incorporated) existing at the date of the deed in the town of Milton, where the land in question, with the temperance hall upon it, is situate.

The grant is to the grantees "and their successors, representatives of the aforesaid societies, or the representatives of the said societies [or ?] of any temperance society by whatever name it or they may be known or designated." The habendum is to the grantees "and their successors in trust for said societies, or such of them as may continue to exist, or to the representative or representatives of any temperance organization having for its object, design and labours for the suppression of the traffic and use of spirituous liquors by whatever name such organization may be known, such successors to be appointed by each and every of such temperance organizations as follows:" Then follows a statement of the manner in which the "successors" or "representatives" are to be chosen.

I think it is reasonably clear, looking at the situation of the temperance hall itself, the uses for which it was intended, and the fact that the temperance societies originally named were all societies formed in the town of

Judgment. Milton, that the trust was intended to be confined to temperance societies having the same local habitation as those which were named in the deed.

Street, J.

It was intended to replace the trustees named in the deed from time to time by trustees appointed by the temperance societies existing from time to time in Milton, and the words of the habendum referring as they do, to "said societies" are large enough to include, not only the societies named in the deed, but "any temperance society" which might be founded in Milton during the existence of the trust, that is, while any of the original grantees should be living.

One of the plaintiffs, David Robertson, has been appointed by a temperance society in Milton called "Milton Council, No. 61, of the Royal Templars of Temperance," to be a trustee under this deed. He swears to the fact of his appointment, and the fact does not appear to be in dispute, as he was not cross-examined upon the point, and the defendant appears in fact to have recognized him as a co-trustee by joining with him in that capacity in managing and letting the building. Of course no appointment of trustees or "successors" or "representatives" can extend or prolong the estate granted to the then original trustees, but that estate still continues, and I think we must hold, upon the evidence before us, that David Robertson and the defendant are at present trustees of the property for the benefit of the unincorporated body by whom Mr. Robertson was appointed.

It appears from the evidence that the defendant, claiming to have acquired title by length of possession, began to pull down the building, and this action is to be treated as an action by his co-trustee to prevent his doing so and to prevent his interfering with the proper use of the building by the temperance society, and to declare the rights of the parties.

I think the action is technically sustainable upon all these grounds and the plaintiffs are entitled to the injunction they ask for, and to a declaration that Robertson and

Harrison are trustees of the building under the terms of the deed as I have construed it: and the defendant, having set up an adverse title in himself, must pay the costs of the action and of the appeal.

Judgment.
Street, J.

G. A. R.

[DIVISIONAL COURT.]

REGINA V. HUGHES.

Intoxicating Liquors—Liquor License Act—Conviction for Selling without License—Steward of Club—Certiorari—Evidence—R. S. O. ch. 194, sec. 50.

The steward of a club, incorporated under R. S. O. (1887), ch. 157, though having no license, supplied, at his own discretion, intoxicating liquors to members and others in exchange for tickets purchasable by members from the club secretary, in a part of the building of which the club were lessees. The liquors originally purchased belonged to the club, which, by its charter was expressly forbidden to traffic in, sell or dispose of such liquors, or allow others to do so in the club building:—

Held, that the steward was rightly convicted of keeping or having liquors for sale without license under R. S. O. (1887), ch. 194, sec. 50.

Graff v. Evans (1881), 8 Q. B. D. 373, distinguished.

Semble.—Though a conviction be good on its face, yet where there is no appeal to the General Sessions the Court will not refuse to go into the evidence on motion to quash.

THIS was a motion to quash the conviction of Horace Hughes by the deputy police magistrate of the city of Toronto, made on July 23rd, 1897, for that he, on May 1st, 1897, at the said city of Toronto, unlawfully did keep liquor for the purpose of sale, barter and traffic therein without the license therefor by law required.

The defendant was the steward of the Wanderers' Bicycle Club, incorporated under R. S. O. (1887), ch. 157, and at the trial of the information on which the defendant was convicted, the president of the club produced a resolution passed at a club meeting on November 23rd, 1896, "that an amount necessary to purchase a stock of liquor be expended equal to the demand or need of

Statement.

Statement. the shareholders, to be placed in the club premises, and the steward to be appointed custodian of the same. Instructions also to be given to him not to allow anybody but a paid-up shareholder to withdraw liquor from the stock, and only such an amount as is called for on an authorized certificate from the secretary or the treasurer, or their authorized deputy, which said shareholder will present on withdrawal. * * And at the time that any shareholder applies for these certificates he must pay to the secretary-treasurer, or their deputy, such an amount as will replace in the general stock the amount to be withdrawn, collecting from the shareholder what is necessary to replace that withdrawn in such an amount that will include not only the cost of the goods, but what in the estimate of the secretary-treasurer, or the directors, will be sufficient above cost to meet the cost from breakages and extra expense in handling."

He also testified: "It was the money of the club that was used to supply the first stock of liquor. The certificate spoken of in the resolution is a ticket, and we give five of them to a member for twenty-five cents. If I took a guest in I could get two tickets on which I could get two drinks, and present one of them to my guest, and if I liked I could give him both drinks. The liquor is in charge of the steward, overlooked by a board, to whom he can refer any matter or who can investigate anything in reference to his conduct. The steward is the one who decides in all ordinary cases as to whether the member shall be supplied on his ticket or not, and he is the occupant of the premises for that purpose. The steward knows the members well. Refreshments are served to members only."

In the club charter it was provided:—

"And we further direct and this charter is granted upon the condition that this charter shall be forfeited and may be cancelled by our Lieutenant-Governor in Council should the said club or the manager, directors, committees or steward or any member thereof, or any other persons with

the assent, or the acquiescence or permission of the said club, the manager, directors, committees or steward or members thereof, deal in, barter, traffic in or sell or dispose of alcohol, spirits or other spirituous, malt or intoxicating liquors upon the premises of the said club; And this charter is accepted upon this condition and upon the terms that any person so dealing in, bartering, trafficking in or selling, or disposing of any such spirituous malt or intoxicating liquors upon the said premises whether he be a member, servant, or agent of the said club or not, shall be guilty of an infraction of the Liquor License Act and of selling intoxicating liquors without the necessary license authorizing or permitting such sale and shall incur the penalties by the said Act provided, and shall be otherwise amenable to all the provisions of the said The Liquor License Act and the amendments thereto, and a plea in such case that such sale or other violation of the said Act took place by a member of the said club to a member thereof or that the said club was duly incorporated, shall not be made, received or entertained, and the said club, member, officer, servant or agent shall be estopped from preferring the same."

The rest of the facts in the case sufficiently appear from the judgment of BOYD, C.

The motion was argued on January 26th, 1898, before BOYD, C., and ROBERTSON, J.

Ritchie, Q.C., for the defendant, contended that *Regina v. Slattery* (1894), 26 O. R. 148, was precisely in point, and that clubs incorporated under the Ontario Joint Stock Companies Act, as the club in question here was, do not come within the Liquor License Act at all: R. S. O. (1887), ch. 194, sec. 53, as amended by 53 Vict. ch. 56, sec. 4 (O.).

J. R. Cartwright, Q.C., for the prosecutor, contended that the magistrate was entitled to infer as he did do, that though the club may have bought the first stock of liquor, they then left it to the defendant to do the best he could:

Argument. *Regina v. Cunerty* (1894), 26 O. R. 51; *Regina v. Charles* (1894), 24 O. R. 432; that the club let to the steward the part of their premises where the liquor was sold; that if he was selling as their servant, this was in direct violation of their charter; and that he came under R. S. O. (1887), ch. 194, sec. 112, as amended by 56 Vict. ch. 40, sec. 4.

Langton, Q.C., on the same side, contended that the conviction being good on its face, the evidence could not be looked at: *Regina v. Coulson* (1893), 24 O. R., at p. 249; *Regina v. Cunerty* (1894), 26 O. R., at p. 53; and that if otherwise, the Court would not interfere if there was anything on which the magistrate could have found as he did.

[*Per* BOYD, C.:—It may be that where a conviction is good on its face, and there is an appeal to the General Sessions, the Court will not go into the facts; but it is a serious thing and a doubtful thing to say, that the Court will not do so, even though the conviction be good on its face, where as in this case there is no such appeal. It would be giving a great opening for injustice on the part of the magistrate.]

Langton.—The club members cannot be said to have been buying from themselves; they bought from the corporate body, paying by tickets. The words of the Act extend to 'dealing in': *Commonwealth v. Smith* (1869), 102 Mass. 144; *Newell v. Hemingway* (1888), 58 L. J. (M. C.) 48.

Ritchie, in reply, contended that the provision in the charter did not affect the defendant, or the provisions of the Liquor License Act; that the head note in *Queen v. Coulson*, was misleading, or the judgment bad law if it went so far: *Queen v. Coulson* (1896), 27 O. R., at p. 59; *Graff v. Evans* (1881), 8 Q. B. D. 373.

February 8th, 1898. BOYD, C.:—

There is evidence sufficient to justify the magistrate's conclusion that the liquors were in possession of the defendant for purposes of sale. Though the whole building may be under lease to the Wanderers' Club their keeping

liquors would be a violation of their charter. Therefore, it may be well supposed that the particular place in the building where the liquors were kept was in the hands of the defendant who it is said in the evidence, decided in all ordinary cases as to supplying the member on his ticket or not, and who was the occupant of the place for that purpose. I do not think we should nicely scrutinize the penetralia of the club or the precise method by which it was sought to evade the stipulations of the charter—that liquor was not to be kept by the club.

Judgment.

Boyd, C.

The room in question was fitted up like a bar—the defendant was in visible possession controlling the stock of liquors therein—the beer was there to be disposed of for an equivalent received by the defendant from those who had the right of entry. As between the club and this defendant there was some arrangement by which he was in possession and control of this room pursuing the illicit employment of disposing of liquor without license, and in violation of the letters of incorporation. The defendant was the agent of the corporation in charge of this particular place in the leased premises where liquor was kept. The corporation could not personally occupy, but in their stead the steward was the custodian and occupant. The liquors probably belonged to the corporation, but the drinks were sold to individual members and others who had tickets. This distinguishes the case from *Graff v. Evans* (1881), 8 Q. B. D. 373, where the club was legally a partnership, and there could be in law no sale from one to the other member of the common stock. No question was raised there that the conviction of the individual manager was right, if the transaction amounted to a sale. The distinction between this and one where the proprietor is distinct from the members (as here) is noted in *Daly on Club Law*, 2nd ed., pp. 103-4.

Upon the American decisions which are more conformable to the trend of liquor legislation in this Province (see sec. 53 of the Liquor License Act, R. S. O. 1887, ch. 194) than the English cases, there is no doubt that what

Judgment. was done in the present case was selling liquor within the meaning of that word as used in the Liquor License Act: *People v. Andrews* (1889), 115 N. Y. 427; *People v. Soule* (1889), 74 Mich. 250; *State v. Essex Club* (1890), 20 Atl. R. 769.

Boyd, C.

Then there is evidence to justify the finding that this defendant was keeper of the room for the purpose of selling the liquor stored there. Sections 50, 108 and 112 R. S. O. 1887, ch. 194, are to be read together. And upon the meaning of the word "keeping" the house or the room or place, this does not necessarily imply property, but may signify share of government or control: see *The Queen v. Williams* (1712), 10 Mod. 63; *S. C.*, 1 Salk. 384.

A servant or agent in charge of such a place may be convicted of keeping it by a jury or justice of the peace: *Commonwealth v. Burke* (1873), 114 Mass. 261; *Newman v. Jones* (1886), 17 Q. B. D. 134.

Altogether I would not interfere with this case, but would dismiss the rule *nisi* with costs.

ROBERTSON, J.:—

After consulting the Liquor License Act and its several amendments, and after reading the charter of incorporation of the Wanderers' Bicycle Club, and reading the evidence given before the magistrate, I am of opinion that the conviction of the defendant was right; the application, therefore, to quash that conviction should be refused.

A. H. F. L.

[DIVISIONAL COURT.]

THE CHURCHWARDENS OF THE CHURCH OF ST. MARGARET
IN THE CITY OF TORONTO ET AL. V. STEPHENS ET AL.*Nuisance—Church—Week-day Services—Skating Rink—Band of Music.*

In an action by the churchwardens and trustees of a church, wherein week-day services were held, to restrain the playing of a band in an adjoining skating rink, which had the effect of disturbing the services :—
Held, that the use by the plaintiffs of the church in the way mentioned was an ordinary, reasonable and lawful use of their property, and the inconvenience to them and the congregation by the defendants' mode of using their property was such as to materially interfere with the use and enjoyment of the plaintiffs' property, and to constitute a nuisance. Judgment of MEREDITH, J., affirmed, with a variation.

THIS was an appeal from a judgment of MEREDITH, J., Statement.
in an action brought by the churchwardens and the trustees of St. Margaret's church in Toronto against John P. Stephens and William J. Death, to restrain the playing of a band in the defendants' skating rink, which interrupted the week day services held in the church.

The action was tried on October 11th, 1897, before MEREDITH, J., without a jury.

H. T. Beck, for the plaintiffs.

A. McLean Macdonell, and *A. C. McMaster*, for the defendants.

The evidence shewed that week day services were held in the church on Wednesday evenings throughout the year and meetings on Thursday evenings. The church was used every evening during Lent for services and otherwise, and the noise of the band playing in an adjacent skating rink interrupted these services and prevented the officiating clergyman making himself heard or understood by his congregations and audiences.

The learned trial Judge found that the defendants had the right to carry on the rink where it was, as long as it

Statement. was carried on without being a nuisance to the neighbours, but that the band was an exceptional and unreasonable noise, and the conducting the rink with the band was an exceptional business, and he granted an injunction restraining the defendants from causing the band to play at such times or in such manner as to disturb public worship in the church, or to prevent the use of the church for the purposes for which it was erected.

From this judgment the defendants appealed and the appeal was argued on December 15th, 1897, before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ.

McCarthy, Q.C., and A. McLean Macdonell, for the appeal, contended that the evidence shewed that the playing of the band was only intermittent and for short periods of time, and that it did not disturb the church services, and that the music would not be complained of if this had been the case of a private house instead of a church where special services were held, requiring more than usual and ordinary quietness, which was more than they were entitled to in a populous and crowded part of a city, and cited *The Directors, etc., of the St. Helen's Smelting Co. v. Tipping* (1865), 11 H. L. C. 642; *Barber v. Penley*, [1893] 2 Ch. 447; *Bamford v. Turnley* (1860), 3 B. & S. 62; *Saltau v. De Held* (1851), 2 Sim. N. S. 133; *Gaunt v. Fynney* (1872), L. R. 8 Ch. 8; *Christie v. Davey*, [1893] 1 Ch. 316; *Walter v. Selfe* (1851), 4 D. & Sm. 315.

H. T. Beck, contra, contended that the defendants had acted unreasonably in refusing all offers of arrangement; that the performance was in the open air and very noisy and that the evidence shewed that it interfered materially with the ordinary user of the church and was as well a nuisance to the neighbours, and that the finding of the trial Judge that the band playing was a nuisance to the church-goers should not be interfered with, and he cited section 173 of the Criminal Code; *Walker v. Brewster* (1867), L. R.

5 Eq. 25; *Gaunt v. Fynney* (1872), L. R. 8 Ch. 8; *Pringle v. Napanee* (1878), 43 U. C. R. 285; *Kinsey v. Kinsey* (1894), 26 O. R. 99; *Roskell v. Whitworth* (1871), 9 W.R. 804; *The First Baptist Church, etc. v. The Schenectady & Troy R. R. Co.* (1848), 5 Barb. S. C. R. (N. Y.) 79; *The Attorney-General v. The Queen Anne, etc., Mansions* (1888), 5 Times L. R. 430; per Kekewich, J., at 431; *Robinson v. Kilvert* (1889), 41 Ch. D. 88; *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685; *Broder v. Saillard* (1876), 2 Ch. D. 692; *Lazarres v. Artistic Photographic Co.*, [1897] 2 Ch. 214; *Drysdale v. Dugas* (1895), 26 S. C. R. 20; *Cartwright v. Gray* (1866), 12 Gr. 399; *Hathaway v. Doig* (1881), 28 Gr. 461; 6 A. R. 264; *Park v. White* (1892), 23 O. R. 611.

McCarthy, Q.C., in reply, referred to Garrett's Law of Nuisances, pp. 116 and 142; *Dann v. Spurrier* (1802), 7 Ves. 230; *Byass v. Bettam* (1885), 2 Times L. R. 88.

February 8th, 1898. MEREDITH, C. J.:—

The action is brought by the churchwardens of the church of St. Margaret, in the city of Toronto, and the trustees of that church and congregation, to restrain an alleged nuisance by the defendants.

The defendants are the lessees of a lot adjoining the church, upon which they have erected and carry on a skating rink; and the complaint of the plaintiffs is that the defendants are in the habit of engaging a brass band with drums and other musical instruments, which plays in the open air in the evenings on a band stand in the rink, erected in close proximity to the church building and during the hours when public worship is being held in it, and that the noise made by the band during public worship is at times so great that it is impossible for the officiating minister to make himself heard or understood, or to address the congregation in an intelligible manner, and the church service cannot, by reason of the band playing, be conducted with any benefit to the congregation; and it is alleged that if

Judgment. the defendants are allowed to continue the band playing
Meredith, it will be necessary to discontinue public worship during
C.J. the evenings on which the band plays; and these alleged acts, it is claimed, constitute a nuisance the continuance of which the plaintiffs claim the right to have enjoined: and they also allege that the playing of the band causes rough people to congregate in the lanes to the north and east of the church building, who commit nuisances on the church property, and the plaintiffs claim similar relief in respect of this as a further nuisance to them in the enjoyment of their property.

The learned Judge found that the plaintiffs had established the nuisance complained of, and granted an injunction restraining the defendants from causing the band to play at such times or in such place or manner as to disturb public worship in the plaintiff's church, or to prevent the use of the church for the purposes for which it was erected.

The defendants contend that the evidence does not warrant the conclusion of fact at which the learned Judge arrived, and that the inconvenience to the plaintiff was not—having regard to all the circumstances—such as to warrant the interference of the Court by the remedy of injunction.

Upon the first point, we entertain no doubt that the conclusion of fact reached by the trial Judge was warranted by the evidence. It was shewn that the noise of the band whenever it played was distinctly heard within the church building during the hours of public worship on the evenings of the week on which evening service was held, and that it was of such a character as to prevent the voice of the minister being heard by some, at all events, of the congregation, and materially to interfere with the minister in carrying on the services which he was conducting and with the devotions of the congregation.

That being the case, ought the injunction to have been granted?

The use by the plaintiffs of the church as they were

using it was, as it seems to me, an ordinary and reasonable as well as a lawful use of their property, and the inconvenience to them and the congregation was such as materially to interfere with the use and enjoyment of it.

Judgment.
Meredith,
C.J.

Taking the rule applicable to be as it is stated by Vice-Chancellor Knight-Bruce, in *Walter v. Selfe* (1851), 4 D. & Sm. 315, that the acts complained of must amount to "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living and habits of living, but according to the plain and sober and simple notions among the English people," p. 322; and applying that standard, it is impossible to say that on the facts proved a case was not made out for the intervention of the Court by injunction.

It was urged by the appellants that in determining whether there had been such an interference as would warrant the granting of an injunction, regard must be had to the character of the neighbourhood, and that a nuisance by noise was emphatically a question of degree, and that considering the neighbourhood in which the plaintiff's church building is situate, what the defendants have done did not amount to a nuisance, and for that proposition the statement of the law in Garrett's Law of Nuisances, 2nd ed., p. 158, was referred to; as he puts it, "the criterion of liability, in the absence of negligence, is whether the injury arose in the natural and ordinary course of enjoyment by the defendant of his property, *special regard being had to its character and surroundings*, or by reason of a non-natural and extraordinary user, that is to say, a user in *excess of the natural and ordinary course of enjoyment*, which results in casting an additional burden on the plaintiff, and materially interfering with the ordinary comfort of his existence."

It was upon the application of this principle that the case of *Christie v. Davey*, [1893] 1 Ch., at p. 327, was decided, dealing with the defendant's counter-claim in which it was held that the noise incident to the carrying

Judgment. on of the defendant's calling as a music teacher, at reasonable hours did not constitute a nuisance, although it was a source of some annoyance to the defendant.
Meredith,
C.J.

In this case, the use by the defendants of their property was not a natural and ordinary one, but "a non-natural and extraordinary," though apart from the question of nuisance, not an unlawful one.

The cases of *Inchbald v. Robinson* (1869), L. R. 4 Ch. 388, and *Lambton v. Mellish*, [1894] 3 Ch. 163, were cases of such a user of property as I have just referred to, and the nature of the acts complained of and which were held to amount to a nuisance in those cases was similar in kind to those of which the plaintiffs in this case complain.

It cannot, I think, make any difference in principle that the enjoyment of the property which is being interfered with is an enjoyment for religious or devotional purposes. In *Roskell v. Whitworth* (1871), 19 W. R. 804, this was recognized, and indeed section 173 of the Criminal Code, 1892, provides special protection for assemblages of persons met for religious purposes, or for any moral, social or benevolent purpose, by making it a criminal offence to disturb, interrupt or disquiet such an assemblage, by among other means making a noise either within the place of such meeting or so near to it as to disturb the order or solemnity of the meeting, though I do not mean to say that the defendants have committed an offence against the section by doing what they have done. I refer to it only to point out that the order and solemnity of such an assemblage have been the object of special care and protection on the part of the Legislature.

It is not necessary to refer at length to the cases, most of which are collected in Mr. Garrett's work, page 158, *et. seq.*

The judgment as drawn up seems to go as far as to prevent the playing of the band at times when services are not being held in the church, if the playing causes rough people to congregate in the lanes as charged in the statement of claim. The direction for judgment endorsed on

the record does not, nor does the evidence warrant that, and to that extent the judgment as drawn up and entered should be varied.

Judgment.
Meredith,
C.J.

The judgment appealed from is therefore affirmed, with the variation I have mentioned, and the defendants must pay the costs of the appeal.

ROSE, J. :—

I agree that we cannot interfere with the finding of fact of our learned brother Meredith on the evidence before us. It was open for him to find upon such evidence that the annoyances complained of produced and will unless checked continue to produce an unjustifiable nuisance to the plaintiffs, that the services of the church are interrupted and that their property has been damaged. I refer to *Roskell v. Whitworth* (1871), 19 W. R. 804, where on similar grounds the trustees of a Roman Catholic chapel were successful in having restrained the use of a steam hammer as a nuisance. See also *The First Baptist Church v. The Schenectady & Troy R. R. Co.*, 5 Barb. (1848), S. C. R. (N.Y.) 79, where an action was sustained against a railroad company for a nuisance for running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighbourhood of a church or meeting house on the Sabbath and during public worship, so annoying and molesting the congregation worshipping there as greatly to depreciate the value of the house and render the same unfit for a place of religious worship.

Mr. McCarthy urged that the plaintiffs were in some way estopped by delay in making this application, his clients having become owners of the rink without notice of any objection on the part of the plaintiffs to the carrying on of the business of a skating rink in the manner in which the defendants have carried it on, and which has been restrained by the judgment in this action.

The plaintiffs did complain while the premises were in

Judgment.

Rose, J.

the occupation of prior owners, and an agreement was come to by which the nuisance was lessened. I think the defendants have no ground upon which to raise any equity or set up any estoppel against the plaintiffs. Even had the plaintiffs not complained prior to the defendants becoming proprietors of the business, that would be no legal answer on the part of the defendants. I refer to *Savile v. Kilner* (1872), 26 L. T. N. S. 277, where it was held that the plaintiff was not barred by delay, but was entitled to an injunction as to the whole of the new works complained of, although one of the chimneys was erected more than twenty years before the filing of the bill. See also *Barwell v. Brooks* (1843), 1 L. T. 75, 454, referred to in Wood's Law of Nuisances, 2nd ed., sec. 520, p. 607. There, the learned author says "In this case we have the important point decided * * that "coming to a nuisance" does not prevent one from availing himself of all proper remedies for damages sustained therefrom." See also *Leonard v. Spencer* (1888), 108 N. Y. R., C. A., 338.

I agree that the judgment must be as stated by the learned Chief Justice.

MACMAHON, J. :—

I agree.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. GRAHAM.

Costs—Unsuccessful Application to Take an Affidavit off the Files—Criminal Code, secs. 897, 898—Weekly Court—Appeal—Jurisdiction.

The costs referred to in secs. 897 and 898 of the Criminal Code are those dealt with by the General Sessions of the Peace, when a conviction or order is affirmed or quashed on appeal to it; but the above sections are not applicable to the costs of an unsuccessful application to a Judge of the High Court to take an affidavit off the files, after a conviction has been moved by *certiorari* into that Court.

After the removal of a conviction into the High Court, the convicting magistrate moved to have an affidavit filed by the defendant, removed from the files of the Court, which was refused with costs payable by the magistrate to the defendant. Subsequently, under the belief that secs. 897-898 of the Code applied, the defendant obtained an *ex parte* order varying the previous order by making the costs payable to the clerk of the peace and then to the defendant, and an appeal from such amended order by the magistrate to the Judge sitting in Weekly Court, was dismissed; the magistrate then appealed to the Divisional Court from the order of the Judge of the Weekly Court, and, also, by leave, direct from the above amended order, when the former appeal was dismissed and the latter allowed.

The Judge sitting in Weekly Court has no jurisdiction to entertain an appeal from an order of a Judge of the High Court made in a criminal proceeding.

THIS was an appeal on behalf of the police magistrate of the town of Toronto Junction from an order of FALCONBRIDGE, J., dismissing an appeal from an order of FERGUSON, J., with reference to certain costs arising out of *certiorari* proceedings, and for leave to appeal from the order of FERGUSON, J. Statement.

The appeal was argued on the 10th day of January, A.D. 1898, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ.

DuVernet and *Woods*, for the police magistrate.

Murphy, Q.C., for the defendant.

The facts appear in the judgment.

February 14th, 1898. MEREDITH, C. J. :—

An order having been made for the removal by *certiorari* into the High Court of the conviction of the defendant by

Judgment.
Meredith,
C.J.

the police magistrate of the town of Toronto Junction, for an assault, the police magistrate applied to Mr. Justice Ferguson for an order to take from the files of the Court an affidavit filed on behalf of the defendant, which the police magistrate alleged to contain scandalous matter reflecting upon him; the application was opposed and ultimately was dismissed with costs.

The order dismissing the motion was drawn up and entered. It bears date 29th October, 1897, and was entered on the 4th November following, and provides that the costs of the application be paid "by the said the police magistrate of West Toronto Junction to the said Henry Graham" (the defendant) "forthwith after taxation thereof."

On the 1st November last the conviction was quashed without costs.

On the 15th of the same month the defendant, acting on the view that the only authority to give costs in a matter such as this is conferred by section 897 of the Criminal Code, 1892, and that that section requires that where costs are given they should be paid to the clerk of the peace, and that the remedy provided by section 898 for the recovery of them is applicable to the costs dealt with by Mr. Justice Ferguson, applied *ex parte* to that learned Judge to vary his order by providing that the costs should be paid to the clerk of the peace of the county of York on or before the 29th November, 1897, and by the clerk of the peace paid over to Graham, and the application having been granted an order was drawn up varying the original order in that way.

From that order, the police magistrate appealed, and his appeal having been heard in the weekly Court by Mr. Justice Falconbridge, was dismissed.

The police magistrate now appeals from the order of Mr. Justice Falconbridge, and applies for leave to appeal from the order of Mr. Justice Ferguson of the 15th November, 1897.

It is contended by the appellant: (1) That sections 897

and 898* of the Criminal Code have no application to the costs dealt with by Mr. Justice Ferguson. (2) That that learned Judge had no power on an *ex parte* application to vary the previous order made by him after it had been drawn up and entered. (3) That Mr. Justice Falconbridge had power under Consolidated Rule 358 to rescind the order of the 15th November, 1897, and ought to have rescinded it.

Judgment.
Meredith,
C.J.

We think it abundantly clear that sections 897 and 898 of the Criminal Code have no application to the costs dealt with by Mr. Justice Ferguson.

The appeal referred to in section 897 is the appeal to the Court of General Sessions of the Peace, for which the preceding sections provide, and the Court referred to is that Court; the forms provided by section 898 shew that the costs which are referred to are costs dealt with by the Court of General Sessions of the Peace on affirming or quashing a conviction or order on appeal to it. Some of the sections preceding section 897 deal with proceedings by *certiorari*, and they are not spoken of as appeals, but different language is used in referring to them. See sec-

* 897. If upon any appeal the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid.

898. If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in default of distress may commit the person against whom the warrant has issued in manner hereinbefore mentioned, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and conveying of the party to prison, if the justice thinks fit so to order (the amount thereof being ascertained and stated in the commitment), are sooner paid, etc.

Judgment.
Meredith,
C.J.

tion 897, where the language is "application to 'quash a conviction," and section 892, where it is "motion to quash," and even if an application to quash a conviction is sometimes spoken of as an appeal from the conviction, that is not what such an application is usually called, or indeed an accurate form of expression as applied to it.

We think, therefore, that the order of the 15th November cannot be supported as an order under section 897, and that an order for payment of the costs in question here to the clerk of the peace with a view to payment of them being enforced under section 898 ought not to have been made.

If, as the applicant contends, the order of the 15th November was an order in a criminal matter or proceeding, the Consolidated Rules have no application to it, and the proper forum in which to apply by way of appeal from it or to set it aside was not the weekly Court, but the High Court; the learned Judge in making the order acted as the delegate of the High Court, and his order was open to review only in that Court.

In this view, Mr. Justice Falconbridge was right in refusing to interfere, and the appeal from him should be dismissed.

It was agreed on the argument that if we were of opinion that leave should be given to appeal from the order of the 15th November, we should deal with that branch of the case as on an appeal from that order. The result is that we give leave to appeal from the order of the 15th November and allow the appeal and discharge the order, and we dismiss the appeal from the order of Mr. Justice Falconbridge.

As each party succeeds in part and fails in part, there will be no costs of the appeals to either of them.

ROSE and MACMAHON, JJ., concurred.

G. F. H.

[DIVISIONAL COURT.]

EWING V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal Corporations—Want of Repair—Hinge on Trap-door on Sidewalk—Accident—Negligence.

The existence of hinges on a trap-door a little more than an inch above the level of the sidewalk in a city affixed by the owner of the abutting premises for convenience of access to his cellar, and against which the plaintiff, who was well aware of their existence, tripped and injured himself, does not constitute such a want of repair as to render the corporation liable for negligence.

THIS was an appeal by the plaintiff in an action for Statement. negligence against the above corporation, and the owners of the property adjoining the sidewalk in question as "third parties," from the judgment of MEREDITH, J., by whom the action was tried without a jury at Toronto, on the 12th October last, when he dismissed the action. The facts fully appear in the judgment of the Divisional Court.

On January 11th, 1898, before a Divisional Court, composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., the appeal was argued.

John McGregor, for the appellant. The condition of the trap door constituted negligence. The learned Judge held that the case came within *Ray v. Corporation of Petrolia* (1874), 24 C. P. 73. The decision in this case is based on *Ringland v. Corporation of Toronto* (1873), 23 C. P. 19, where the Court held that the non-repair must be such as would justify an indictment. The Courts have since dissented from this view: *Burns v. Corporation of Toronto* (1878), 42 U. C. R. 560; *Mason v. Corporation of Peterborough* (1893), 20 A. R. 683; *Drennan v. Corporation of Kingston* (1896), 23 A. R. 406. The English authorities also shew that the defendants are liable: *White v. Hindley Local Board* (1875), L. R. 10 Q. B. 219; *Blackmore v. Vestry of Mile End Old Town* (1882), 9 Q. B. D. 451. The corporation had sufficient

Argument. notice of the existence of the hinge. It is not necessary that there should be actual notice. Constructive notice by length of time is sufficient: *Castor v. Corporation of Uxbridge* (1876), 39 U. C. R. 113.

Lount, Q.C., for the respondents the third party defendants. The liability of the third party defendants depends on the liability of the original defendants the city of Toronto. The case of *Ray v. Corporation of Petrolia* (1874), 24 C. P. 73, was properly decided, and shews there is no liability.

Fullerton, Q.C., for the respondents, the defendants the city of Toronto. The abutters on streets have certain rights, and amongst others access to their premises. The trap door to the cellar was necessary for the purpose of getting to the cellar. The whole question depends upon the existence of the hinge, and it cannot be reasonably contended that the hinge, one and a half inches high, which was necessary for the use of the trap door, constituted evidence of negligence. This was the view taken in *Ray v. Petrolia* (1874), 24 C. P. 73. There the hinge was two inches above the level of the trap door. That case was not decided on the ground that the want of repair was such as would justify an indictment, but on the ground that it did not constitute evidence of negligence. The facts of the present case bring it clearly within the decision in *Ray v. Corporation of Petrolia*, and the defendants are not liable. There is also the fact that the plaintiff repeatedly walked over this place and never considered it dangerous, and no one ever notified the city that it was dangerous, and, notwithstanding this, the Court are asked to assume that it was dangerous. In *Hutton v. Corporation of Windsor* (1874), 34 U. C. R. 487, the decision in *Ray v. Corporation of Petrolia*, 24 C. P. 73, was approved. In *Goldsmith v. Corporation of London* (1889), 16 S. C. R. 231, a projection of four inches above the sidewalk was not considered dangerous, and in *Griffiths v. Town of Portland* (1885), 11 S. C. R. 333, where the plaintiff slipped into a hole in the sidewalk, the existence of which was known to him, Henry, J., was of the opinion that

the knowledge of the plaintiff of the existence of the hole, was a question of contributory negligence to be submitted to the jury. Argument.

John McGregor, in reply. If the existence of the hinge constitutes negligence, the fact of the plaintiff being aware of its existence does not free the city from liability; and as to the fact of the city not being notified, this, as before pointed out, is no answer, so long as it has existed for sufficient time to constitute constructive notice to the corporation.

February 14, 1898. MEREDITH, C. J. :—

The plaintiff sued to recover damages for injuries sustained by him, as he alleged, through the negligence of the defendants in allowing the sidewalk on the west side of Peter street, near Queen street, in the city of Toronto, to be so out of repair as to be unsafe for the use of pedestrians.

There is no complaint as to the condition of the sidewalk disclosed in the plaintiff's pleading or the evidence, except as to this: That the hinges of an iron trap over eight feet in length, extending from the westerly limit of Peter street to and beyond the easterly end of the sidewalk were so affixed as to rise from an inch to an inch and one-sixteenth above the level of the sidewalk.

The door was a double one, used for the purpose of access to the cellar of abutting premises, which were occupied as a tavern, and there were three hinges on each half of the door by which it was attached to the sidewalk, but the most easterly one on either side of the opening was not in line with the sidewalk. Each hinge had a strap, or flap, by means of which it was affixed to the door. The flap was about three inches square, and the upper surface of it was about half an inch above the level of the door, and the moveable part of the hinge extended, as I have said, to the height of an inch or an inch and one-sixteenth of an inch above the level of the sidewalk, and was of the

Judgment.

Meredith,
C.J.

same length as the width of the flap, and about three-quarters of an inch in width.

Such was the extent of the obstruction, if obstruction it was, of which the plaintiff complains.

The accident occurred in February, after nightfall; the night was not dark, and the place of the accident was lighted by means of an electric lamp, which was alight at the time, on the opposite corner, but as the plaintiff was proceeding southward his body and the shadow of it, to some extent, interfered with the rays of light projected from the lamp. The cause of the injury was a fall, owing to the plaintiff having stubbed his toe against the centre hinge on the side of the door nearest to Queen street.

The plaintiff was well acquainted with the locality, and his evidence shewed that he had been in the habit for three years preceding the day of the accident of passing over the spot where he was injured at least once or twice daily. He was alive to the existence of the hinges, and the extent to which they presented an obstacle to a pedestrian having a perfectly even surface to walk upon; and, according to his own statement, believed them to be a source of danger to those who, in passing down Peter street, had to encounter them.

The learned Judge, being of opinion that the case of *Ray v. Corporation of Petrolia* (1874), 24 C. P. 73, was a binding authority for the proposition that the existence of such a condition of things as the plaintiff complained of did not constitute want of repair within the meaning of the Municipal Act, so held, and dismissed the action at the close of the plaintiff's case.

In the view we take it is unnecessary to consider whether the learned Judge was right in treating the case referred to as a binding authority to the extent to which he so dealt with it, though being a decision of the Court on a question of fact it was not necessarily a binding authority in this case: Lord Esher, M.R., *Englehart v. Farrant & Co.*, [1897] 1 Q. B. 240, at p. 244.

The question in *Ray v. Corporation of Petrolia*, how-

ever, was whether the plaintiff had made out such a case as might warrant a jury in finding that the defendants were guilty of the negligence charged against them, while in this case the action being tried without the intervention of a jury, the question was whether such a conclusion ought to be drawn from the evidence by the Judge himself.

Judgment.
Meredith,
C.J.

Dealing with the case in the latter aspect we are of opinion that a finding in favour of the plaintiff is not warranted by the evidence.

The defendants' duty was to keep the sidewalk in such a state of repair as was reasonably sufficient, having regard to all the circumstances, to enable persons, using it with ordinary care, to do so safely.

The action is for negligence in omitting to discharge that duty.

The doors were placed where they were, not by the defendants, but by the owner or occupant of the abutting premises, for the reasonable and convenient use by him of his property. It is unnecessary to say whether he had a right to use such a means of access without the consent or against the will of the defendants; but, assuming that he had not, and that he was a wrongdoer in placing the doors where they were put, I fail to see how the defendants are liable in this action. Whether they were guilty of negligence or not depended upon the answer to the question: Ought a reasonable man, under a like obligation as to keeping in repair the sidewalk, if he had thought about it, to have anticipated loss or injury as a natural and probable consequence to persons using the sidewalk with regard to whom he had a duty not to be negligent? Beven on Negligence, 2nd ed., p. 97. If the answer be in the negative, as it appears to me that it must be in this case, the proper conclusion is that the charge of negligence is not made out.

In my opinion, it would not be a reasonable conclusion on the facts of the case to find that the defendants' officers and servants ought to have anticipated as a natural and probable consequence of the condition and arrangement

Judgment.
Meredith,
C.J.

of the doors that the safety of persons using the sidewalk would be endangered, but on the contrary that the happening of such an accident as the plaintiff met with, though it might be conceived as a remote possibility, was neither a natural nor a probable result to be anticipated from the existing state of things.

Hinges like those of which the plaintiff complains are to be met with in many of the streets of this city, as well as other cities and towns, and appear to be used without any idea that the safety of the public is being thereby endangered, and without any accident happening by reason of them, and it would, in my opinion, impose an unreasonable and unnecessary burden on municipal corporations if they were required on the peril of responsibility for the happening of such an accident as the plaintiff appears unfortunately to have met with, to insist upon the property owner removing his doors or readjusting them so that no part of them would interfere with pedestrians having a perfectly even surface upon which to walk.

It follows from what I have said that in my opinion the existence of the hinges in the place where they were, having regard to the purpose for which they were put there, and the other circumstances of the case, did not constitute a want of repair of the highway so as to amount to a breach of the defendants' statutory duty to "keep in repair" their streets, as the expression "keep in repair" has been interpreted by the Courts.

The appeal should, in my opinion, be dismissed, and the judgment appealed from affirmed with costs.

ROSE and MACMAHON, JJ., concurred.

Judgment accordingly.

G. F. H.

[DIVISIONAL COURT.]

REGINA V. FITZGERALD.

Conviction—Order Nisi to Quash—Death of Prosecutor After—Effect of.

The death of the prosecutor, who is also informant, after a summary conviction, before the service on him of an order *nisi* to quash, does not prevent the Court from dealing with the matter and from quashing the conviction.

THIS was a motion to make absolute an order *nisi* to quash a conviction for cutting a quantity of pulp wood made by two justices of the peace for the district of Parry Sound. Statement.

After an order *nisi* had been granted to shew cause why the conviction should not be set aside, on the ground of its invalidity, the informant, who was the prosecutor, before service on him of the order, died, but service had been made on the magistrates.

On January 12th, 1898, before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on moving to make the order absolute *Douglas Armour* who supported the motion called the attention of the Court to the fact of the death of the prosecutor; he contended that the death did not put an end to the proceedings, and referred to: *Regina v. Truelove* (1880), 5 Q. B. D. 336; *Paley on Convictions*, 7th ed., 379.

No one shewed cause.

[The Court were of the opinion that the conviction could not be supported; but reserved judgment on the question as to the effect of the death of the prosecutor.]

February 14, 1898. The judgment of the Court was delivered by ROSE, J.:—

This was a motion for an order absolute to quash a conviction on grounds stated. We were of the opinion that neither the information nor the conviction disclosed

Judgment.

Rose, J.

any offence known to the law, that the evidence disclosed no offence and that the conviction was not sustainable.

The order *nisi* had not been served upon the complainant, he having died after the granting of the order and before the service. It was served upon the justices. No one shewed cause.

Our attention was properly called by Mr. Armour to the fact of the death of the complainant, and that the order *nisi* had not been served upon him, and we reserved judgment to consider whether the death of the complainant and the want of service made any difference. I think it is clear that it did not. In *The Queen v. Justices of Leicestershire* (1850), 15 Q. B. 88, it was held that an appeal from an order in bastardy should have been heard by the justices, notwithstanding the death of the woman before notice to her was posted. The Sessions were of the opinion that the condition imposed by statute 8 & 9 Vict. ch. 10, sec. 3, as preliminary to appeal not having been complied with, they had no right to hear the appeal. The Court held on demurrer to the return to the mandamus to enter appearance and hear the appeal, that the performance of the condition imposed by statute having by act of God become impossible, its performance was excused and a peremptory mandamus was awarded. If this case had been heard under our statute by way of appeal it would have been sufficient to have given notice to the respondent or to the justice who tried the case: see sec. 880 of the Criminal Code.

In *The Queen v. Truelove* (1880), 5 Q. B. D. 336, after the issue of a summons on a complaint that obscene books were kept by the defendant in his shop for sale, and before the hearing, the complainant died and no application was made to substitute another complainant. The Court held that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid.

In *The People v. Nixon* (1867), 45 Ill. 353, it was held that the death of the mother did not abate bastardy proceedings

commenced during the life of the mother. The Court there said: "The mother is not a party to the record, although allowed to control the suit, and may be liable for costs in case the defendant is discharged. The mother not being a party, there is no technical reason for the abatement of the suit. Its prosecution may be more important to the public than if the mother had not died."

Judgment.
Rose, J.

See also *The People v. Smith* (1885), 17 Ill. App. (Bradwell) 597 ; also *R. R. v. J. M.* (1825), 3 N. H. R. 135.

It is clear under our procedure that the informant is not a party to the record, although his name appears and in certain events he may be made liable for costs. It is also true that the security given on the motion for *certiorari* covers the costs of the informant in the event of any costs being ordered to be paid by the defendant to the informant. But this does not in any wise make the informant a party to the record. There is no particular reason why the informant should be represented upon this motion. Any cause of action which would have arisen upon the quashing of the conviction had the informant been alive does not survive his death. The maxim *Actio personalis moritur cum persona*, applies.

The order must go quashing the conviction without costs, and there will be the usual order for protection of the justices.

MEREDITH, C. J., and MACMAHON, J., concurred.

G. F. H.

[DIVISIONAL COURT.]

FARQUHARSON V. THE IMPERIAL OIL CO.

*Waters and Watercourses—Riparian Owners—Soil of Stream—Dams—
R. S. O. (1887) ch. 120, sec. 1—"Other Obstruction."*

The words "any other obstruction" in sec. 1 of R. S. O. (1887) ch. 120, mean obstruction of a like kind as "felling trees," etc., previously mentioned in the section, and do not comprehend the erection of a dam across a stream by the owner of the land on each side of the stream and of the river bed.

Statement. THIS was an appeal by the plaintiff from the judgment of BOYD, C., in an action brought by a lumberman against the defendant company for damages for having constructed two dams across a stream and so obstructing plaintiff in getting his timber and saw logs down.

Aylesworth, Q.C., Lister, Q.C., and A. E. Shannessy, appeared for the plaintiff.

Osler, Q.C., and Moncrieff, Q.C., appeared for the defendants.

The following facts are taken from the judgment of ARMOUR, C.J., in the Divisional Court.

Bear Creek rises in the north-east part of the county of Lambton and flows in a south-westerly direction through the county and at the point where the dams hereinafter mentioned were constructed was about seventy-five feet wide and in the spring and autumn greatly overflowed its banks, but in the middle of summer was nearly dry.

In the fall of 1893, one Woodley, the owner of the lands on both sides of the said creek constructed thereon a dam for the purpose of making ice, the defendants supplying some of the labour and materials for that purpose and placing therein with the consent of Woodley a six inch pipe for the purpose of running the water from this dam down to one built by them lower down the stream which they constructed under license from the proprietors of the lands on both sides of the creek, the water penned back by

both of these dams was used by the defendants for the purposes of their business as oil refiners. Statement.

The plaintiff was a lumberman and got out logs some distance higher up the creek and complained that in driving his logs down the creek in the years 1895, 1896 and 1897, they were obstructed and delayed by the said dams and he brought this action against the defendants claiming that these dams were wrongful obstructions across the said creek and that the defendants by reason of such wrongful obstructions were answerable to him for the damages which he had sustained by reason thereof.

The cause was tried before the Chancellor without a jury at the last Sittings of this Court, for the trial of actions with a jury at Sarnia on October 11th and 12th, 1897, who dismissed the action on the ground that the defendants were not responsible for the Woodley dam and that the plaintiff suffered no damage by reason of the defendants' dam.

The appeal was argued on January 31st, 1898, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.

Aylesworth, Q.C., and *A. E. Shannessy*, for the appeal, contended that the evidence shewed damage suffered by the plaintiff by being delayed in getting his logs down the stream and did not shew any title to the bed of the stream in the riparian owners; and even if it did that no obstruction should be placed in the stream, which was a highway at common law and which plaintiff was entitled to use under R. S. O. 1887 ch. 120, secs. 1 and 2, and that a dam was the same kind of obstruction as was referred to in section 1 where "trees" are mentioned and cited *Caldwell v. McLaren* (1884), 9 App. Cas. 392; *Gage v. Bates* (1858), 7 C. P. 116; *Gould on Waters*, 2nd ed., 675, 676; *Mackey v. Sherman* (1885), 8 O. R. 28; *The Queen v. Meyers* (1853), 3 C. P. 305.

Argument. *Osler*, Q.C., contra, contended the evidence shewed that the logs were not delayed by the dams but by a jam in another part of the stream: that the dams were not obstructions within the meaning of the statute, and if they were the remedy is given by sec. 1 of R. S. O. 1887 ch. 120, and he referred also to sections 2, 4 and 5 of that statute.

Shannessy, in reply, contended that 47 Vict. ch. 17 (O.), on which the legislation in the Revised Statute was based shewed by recitals what was to be provided for; that the power to put in slides or aprons was only given to overcome natural obstructions, and that the stream should be free from obstructions although it could only be used in times of freshets: *Shipman v. Clothier* (1852), 8 U. C. R. 593.

February 10th, 1898. The judgment of the Court was delivered by

ARMOUR, C.J. :—

The Judicial Committee of the Privy Council in *Caldwell v. McLaren* (1884), 9 App. Cas. 392, at p. 404, said, "There can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, *prima facie* at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it.

"One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have a right to navigate the stream, and when-

ever such a right exists, the right of the mill-owner and the right of the public conflict. They may co-exist but when they do one or other must be modified." Judgment.
Armour, C.J.

The plaintiff does not put his case upon the ground that the defendants having the right to construct the dams in question negligently constructed them ; nor, alleging that there was a duty upon them to construct the said dams with aprons or slides thereon, on the ground of their neglect of such duty ; but he puts it solely upon the ground that the defendants " although not riparian proprietors or in anywise entitled to any right, property or interest in the said stream or creek apart from the other members of the public, wrongfully erected," the said dams.

Woodley was undoubtedly the owner of the land on each side of the creek and *prima facie* the owner of the soil which formed the bed of the creek at the point at which he constructed his dam and as such owner had, as we have seen, the right to construct the said dam.

At the point at which the defendants constructed their dam one Fairbank owned the land on the west side of the creek and *prima facie* the soil which formed the bed of the creek to the centre of the creek : and Fitzgerald and Fellows owned the land on the east side of the creek and *prima facie* the soil which formed the bed of the creek to the centre of the creek, so that at this point Fairbank, Fitzgerald and Fellows, together, owned the land on each side of the creek and were *prima facie* the owners of the soil which formed the bed of the creek and it was under their leave, license and authority, that the defendants constructed their dam and they had, therefore, the right to do so: *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1 ; *Miner v. Gilmour* (1858), 12 Mop. P. C., at p. 156.

These dams were not, therefore, wrongfully erected and so the ground of the plaintiff's action fails.

Much reliance was placed on the argument upon that part of section 1 of R. S. O. 1887 ch. 120, which provides that " no person shall by felling trees or placing any other obstruction in or across any such river, creek or stream,

Judgment. prevent the passage thereof," and it was contended that the words "any other obstruction" comprehended the erection of these dams but I think they comprehend only other obstructions of a like kind with felling of trees and this is apparent from the provision of section 5 of the Act which provides that "this Act shall not apply to a dam, river, or bridge erected in or over such river, rivulet or watercourse, or to anything done *bond fide* in or for erecting the same, or to any tree cut down or felled across such river, rivulet or watercourse, for the purpose of being used as a bridge from one side thereof to the other; provided such tree does not impede the flow of water or the passing of rafts," and it becomes still more apparent when we look at the origin of this provision in 12 Vict. ch. 87, sec. 5.

The motion will, therefore, be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

THE QUEEN V. HAMMOND.

Criminal Law—Evidence—Criminating Questions—Privilege—Canada Evidence Act, 1893—Res Gestæ—Evidence of Rejected Applications for Insurance—Coroner's Court—Court of Appeal in Criminal Cases—Res Judicata—56 Vict. ch. 31 (D.).

Section 5 of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.), which abolishes the privilege of not answering criminating questions, and provides that no evidence so given shall be receivable in evidence in subsequent criminal proceedings against the witness, other than for perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege.

MEREDITH, J., dissenting.

Regina v. Williams (1897), 28 O. R. 583, not followed.

On a charge of wife murder, the Crown sought to prove that the prisoner had been with evil design accumulating insurance on his wife's life:—*Held*, that evidence of various applications for insurance, though in some cases resulting in rejection of the risk, was admissible, all being made practically at the same time and forming part of one transaction which could be properly given in evidence as a whole.

The Coroner's Court is a criminal Court.

As the Court of Appeal for criminal cases is now constituted the decision of the Judges of one Court is not binding on Judges sitting as another Court of co-ordinate jurisdiction.

THIS was a Crown case reserved by MEREDITH, J., **Statement.** before whom the prisoner, William James Hammond, was tried and convicted at the Court of Oyer and Terminer held in and for the Provincial Judicial District of Muskoka and Parry Sound at Bracebridge, on November 30th, 1897, and four following days, on an indictment which charged him with the murder of his wife Katie Hammond.

During the trial the depositions of the prisoner taken under the circumstances detailed in the testimony of the coroner, and sufficiently stated in the judgments, were tendered as evidence for the prosecution, objected to by the defence, and admitted as evidence by the learned Judge, who considered that he was bound by the case of *Regina v. Williams* (1897), 28 O. R. 583, but reserved for the opinion of a Divisional Court composed of Judges of the Chancery Division the question—"Whether those depositions taken under those circumstances were properly admitted as evidence?"

Statement. Further, at the trial, evidence was tendered for the Crown of applications and attempts by the prisoner to obtain further insurance upon the life of his wife which were refused or otherwise not effected, which evidence was objected to, but admitted, and the question was reserved—"Whether such evidence was properly admitted and, if not, whether by reason of the admission of it, the prisoner is entitled to a new trial."

The case was argued on January 25th, 1898, before BOYD, C., ROBERTSON, and MEREDITH, JJ.

E. F. B. Johnston, Q.C., for the prisoner, contended that sec. 5 of the Canada Evidence Act, 1893. 56 Vict. ch. 31, had changed the whole policy of the law; that now, in the interests of justice, all facts must be got at and no witness may shield himself, but he is protected as to any information so given: *Russell on Crimes*, 6th ed., vol. 3, pp. 512-520; *Regina v. Scott* (1856), D. & B. 47; *Wakley v. Cooke* (1849), 4 Exch. 511; that though the prisoner had given the evidence voluntarily, still under the enactment in question he would have had to give it; that the coroner's court is a criminal court, and a court of record: *Boys on Coroners*, p. 2; *Garner v. Coleman* (1868), 19 C. P., at p. 108; *Lewis's Blackstone*, vol. 4, p. 274, sec. 11; *Archbold on Criminal Pleading and Evidence*, 21st ed., p. 132, though the finding of a coroner is no longer equivalent to the finding of a true bill by a grand jury: *Criminal Code*, 55-56 Vict. ch. 29, secs. 568, 642; that it could not have been necessary for the prisoner to take a meaningless objection to giving his evidence in order to come within the protection of the section; that "no person" in the section means "no witness," and "so given" means "given under such circumstances"; and that in *Regina v. Williams* (1897), 28 O. R. 583, the Divisional Court were seeking to amend the statute: *Regina v. Hendershott and Welter* (1895), 26 O. R. 678. As to the second branch of the case, he contended that it is only when the prior acts sought to be given in evidence are acts of crime, that the courts allow them to be

proved as leading up to the act in question; that when there are acts connected together shewing a system, which system leads up to death, then the evidence is relevant as part of the *res gestæ*; that none of the evidence of lapsed policies could be evidence of intent, for they shewed no motive existing at the time of the killing. Argument.

J. R. Cartwright, Q.C., for the Crown, contended that the insurance existing at the time of death shewed the motive for the killing, but the abortive applications shewed the motive for which that insurance was put on—the plan—the scheme. On the other point, he contended that a coroner's court was not a criminal court within the meaning of the Canada Evidence Act, 1893, 56 Vict. ch. 31; that the Criminal Code had altered its character, and that this being so, there was no question as to the admissibility of the evidence; that if it were a criminal court, *Regina v. Williams* (1897), 28 O. R. 583, bound this Court; that in construing the section the Legislature must not be supposed to have interfered with the law further than necessary to deal with some evil sought to be remedied by the Act; that the section in question implied that the man had asked to be excused from giving his evidence, as was always necessary if he was to be protected; that if the Act had meant that none of the evidence given should be admissible, it would have said so as in R. S. C. ch. 150, sec. 8, sub-sec. 2, and ch. 164, sec. 97, sub-sec. 3; that "so given" means "given under this section": Wilberforce on Statute Law, p. 20; Maxwell on the Interpretation of Statutes, 3rd ed., p. 113; Hardcastle on the Interpretation of Statutes, 2nd ed., p. 322; *Regina v. Buttle* (1870), L. R. 1 C. C. R. 248; *Regina v. Sloggett* (1856), Dears. C. C. 656; *Regina v. Erdheim*, [1896] 2 Q. B. 260, 3 Mans. B. C. 142. *Johnston*, in reply.

February 8th, 1898. BOYD, C. :—

The answer to the first question reserved depends upon the proper construction and meaning of sec. 5 of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.). It reads thus :

Judgment. "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him * * provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Boyd, C.

Upon the investigation of crime prior to this statute, a witness brought before the coroner was not obliged to answer any question that tended to self-incrimination. The practice of the courts founded upon the common law was embodied in the maxim "*nemo tenetur seipsum accusare*." The witness had in his own hands the power of self-protection by objecting to answer on that ground, and then it fell to be judicially determined whether the circumstances justified his silence. If the ruling was in his favour the question remained unanswered. If it was against him, the witness was ordered to answer. If, however, it turned out that the ruling was wrong and that the answer when given did tend to criminate him the mischief was repaired by holding that the testimony was the result of improper and illegal compulsion and could not be used against the witness: *Regina v. Garbett* (1847), 1 Den. C. C. 236, and more fully (1847), 2 C. & K. 474, and *Regina v. Coote* (1873), L. R. 4 P. C. 599. Then it was further held that if the witness elected to waive his privilege by answering without claiming it, when he might lawfully do so,—he was deemed to have answered voluntarily and the evidence could afterwards be read against him: *Regina v. Sloggett* (1856), 7 Cox C. C., at p. 144.

The general state of the law before this Act was as stated by Willes, J., in *In re Fernandez* (1861), 10 C. B. N. S., at p. 39: "Every person * * may be called upon and is bound to give evidence to the best of his knowledge upon any questions of fact material and relevant to an issue tried in any of the Queen's Courts, unless he can shew some exception in his favour, such, for instance, as that

* * to answer might put him in peril of criminal proceedings." Judgment.
Boyd, C.

There was and is in England a noteworthy exception created by statute in the case of bankruptcy proceedings.

In these statutes sanction is given to incriminating interrogatories. And it is decided that when the law allows such questions to be put and the witness is thereby compelled to speak, such compulsion is legal and the answers are (in the absence of any clause of immunity) admissible for all purposes thereafter: *Regina v. Scott* (1856), D. & B. 47. That result has been deprecated as harsh and impolitic: *Regina v. Robinson* (1867), L. R. 1 C. C. R. 80; *In re Solicitor* (1890), 25 Q. B. D., at p. 25. Perhaps for some such reason the Canadian Parliament has expressly provided that evidence given by the witness under the section shall not be used against him. The former privilege of silence is thus abolished and as a substitute the disclosure when made becomes privileged.

And this broadly speaking was what was ruled by the court in *Regina v. Hendershott* (1895), 26 O. R. 678; but this case was afterwards overruled by the Divisional Court in *Regina v. Williams*. In view of these diverse holdings and sitting as a court of final appeal, it is our duty to examine the matter independently: see *In re Larkin* (1841), 4 Ir. L. R. 46; and *Haight v. McInnis* (1862), 11 C. P. 518, 523.

Regina v. Williams decides that evidence given before the coroner and jury by the witness may be afterwards read against him unless he has before answering claimed privilege from the court and been ordered to answer. That precisely is the point here arising for determination.

This defendant was brought before the coroner by a constable as a witness—whether under subpœna or not does not accurately appear. He was "cautioned" by the coroner that "it was not necessary to be examined under oath without he wished to be so and that any evidence taken might be used against him." He then said he wished to give evidence and was sworn in the usual way

Judgment. and was asked questions by the county attorney and the
Boyd, C. coroner and perhaps by the jury in response to which the evidence, now under objection, was given. That evidence was used to fix criminal liability upon him and it is relevant for that purpose. This witness did not make a voluntary confession or an officious statement; what he said was when being examined under oath. He was speaking under what was called the "lawful duress of an oath" in *Scott's* case (see also *Rex v. Britton* (1833), 1 M. & Rob., at p. 299), and was also giving evidence under the compulsion of the statute. He was in every sense, therefore, bound to speak the truth and the whole truth, in response to the officers of the court. True, he did not claim the privilege of silence as to any question. Did this omission free his testimony from the protection of the statute so that it can be used against him in this trial? The Divisional Court says: "Yes, because the intent is to exclude evidence given under compulsion and evidence is given voluntarily when the party giving it may object to giving it and does not do so." And further it is said in the judgment (28 O. R., at p. 587) the words in the section 'so given' "apply only to evidence given by a person who has claimed to be excused from answering upon the ground that his answer may tend to criminate him, etc., and not to evidence volunteered or given without such claim or privilege." The point of this decision then is that evidence given without claim of privilege is to be treated as voluntary evidence,—which, like a voluntary confession, may be used always against the person making it.

Before the Act, this claim of privilege stood for something, so that it might be lawfully and effectively used as a protection. Now it is a mere futile form; to claim it cannot help the witness and the failure to claim it ought not to hurt him. Once, submitted to the court that it might be judicially determined whether it should or should not be granted: *Lamb v. Munster* (1882), 10 Q. B. D. 110, there is now no power to consider it, for the statute forbids.

In fact and in law the witness under oath, answering questions pursuant to the statute, does not speak voluntarily, he is under legal compulsion throughout. Surely, therefore, the doctrine of compulsion propounded in the older authorities and adapted to present practice in *Regina v. Williams*, is without pertinence or significance.

Judgment.

Boyd, C.

If the statute takes away the privilege and takes away the discretionary function of the court it remains that the witness is bound to answer and is protected in what he says.

So far as the preliminaries to this examination are concerned, the caution of the coroner to the witness was not well advised. The rule under the former law is laid down in *Jervis on Coroners*, thus, that a coroner has no right to refuse to examine persons upon oath at an inquest merely on the ground that their evidence might criminate themselves; the proper course is to tell him (the witness) "that he is not bound to criminate himself and to allow him to make any statement he may wish": 5th ed., p. 35, citing *Wakley v. Cooke* (1849), 4 Exch. 511. That will require to be modified under the Canada Act but not in the way that it appears in the coroner's evidence at the trial.

But apart from caution from the Bench at the critical point, which was practically the rule in criminal cases before this Act: *Fisher v. Ronalds*, 12 C. B. 763; *Regina v. Garbett* (1847), 1 Den. C. C., at p. 248, in argument, and 2 C. & K., at p. 485, *per* Wilde, C. J., the witness is presumed to know the law and so here he is to be presumed to know the terms of the statute: *Regina v. Coote* (1873), L. R. 4 P. C. 599. In the *Coote* case he knew that if he was to claim privilege he might avoid answering, and in the present case the witness in contemplation of law knew (as did the coroner also) that there was no privilege or power which could excuse him from answering. Why then make any such claim? And this brings us to the fair meaning of the Act taken by itself.

The reading of the Divisional Court involves some difficulties and objections: (1) This section is regarded as of

Judgment. elliptical construction and words are introduced that are
Boyd, C. not obviously intended. Thus "no person shall be excused" is read as "no person (claiming to be excused) shall be excused." (2) Again, the words "so given" are intensified into "given under compulsion," or, as more fully set forth in the reasons of the court, "answers tending to criminate which the witness objected to answer and was not excused from answering but was compelled to answer." (3) The scope of the section is restricted so as to provide only for conditional immunity from the answers, founded on privilege being claimed.

A better and more simple reading suggests itself thus, "No person shall be excused (*i.e.*, exempt or privileged) from answering any question upon the ground that the answer to such question may tend to criminate him. * * Provided, however, that no evidence so given (*i.e.*, in answering any question) shall be used or receivable against such person," etc.

Let me now attempt to support this as the legitimate and proper reading of the section. The provincial law in force at the time provided that no person was compellable to answer any question tending to criminate himself (R. S. O. 1887, ch. 61, sec. 5). The rules of evidence in each Province were adopted by the Dominion in the Evidence Act, but subject to its provisions: 56 Vict. ch. 31, sec. 21. Section 5, saying that no person shall be excused from answering, does in effect compel him to answer, the "privilege of silence" being no longer available.

The phrase "excused from answering any question" appears (for the first time I think) in the English Corrupt Practices Act of 1852 (15-16 Vict. ch. 57, sec. 9), in which, after providing that a witness should make true discovery of all things as to which he was excused and should be freed from all criminal prosecutions to which he might be liable, etc., the closing words are: "And no such person shall be excused from answering any questions put to him * * on the ground of any privilege or on the ground that the answer to such questions will tend to criminate him."

(See also Imperial Statute 17-18 Vict. ch. 38, secs. 5 & 6.) Assuming this to be the original of our legislation it is to be noted that the reference to the privilege expressed in the earlier is omitted in the later Canadian Act. Nevertheless, the implication of privilege to be repealed pervades the section and if any words were needed to amplify the meaning it would be thus: "No person (on the ground of any privilege) shall be excused," etc. Hence, a fair equivalent is to read: "No one shall be privileged from answering."

Judgment.
Boyd, C.

The word "excused" does not *per se* imply a prior request or claim. *Excusare* in civil law is "to relieve" or "absolve one from a thing": Adams' "Glossary," vol. 1, p. 856 *sub voce*. A well recognized synonym for "excused" in this connection is "exempted." That is the very word used in the French version of the Act: "*Personne ne sera exempté de répondre: La Banque Jacques-Cartier v. Gagnon*, (1894), Q. O. R. 5 S. C. 251. And the collocation is found in an analogous enactment as to the fraudulent marking of merchandise (R. S. C. ch. 166, sec. 12), by which it is declared that the provisions of the Act "shall not exempt or excuse any person from answering or making discovery upon examination as a witness," and it proceeds: "but no evidence * * which any person is so compelled to give or make shall be admissible in evidence against such person," etc. See also the marginal note to R. S. C. ch. 164, sec. 71, where "exempt" is used as expressive of "excused."

Again, the phrase "so given" implies no element of compulsion extraneous to the statute. The enactment does not read "no answer so given" but "no evidence so given," *i.e.*, evidence given in answer to questions. That appears to be the turning point of the immunity granted; if a disclosure is responsive to questions on a compulsory examination during judicial proceedings it is protected: *Regina v. Strahan* (1855), 7 Cox C. C., at p. 87; *Regina v. Cherry* (1871), 12 Cox, at p. 39, Martin, B.

So, an analogous provision is found in R. S. C. ch. 164, sec. 97, sub-sec. 3, as to false statements in relation to land

Judgment.

Boyd, C.

in British Columbia and cited in *Regina v. Williams*: "Nothing in this section shall entitle any person to refuse to make a complete discovery * * or to answer any question * * in any court; but no answer to any such * * question * * shall be admissible against any such person in any criminal proceeding." And further to the same effect is the provision in R. S. C. ch. 150, sec. 8, sub-sec. 2, relating to explosive substances. A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate himself; but any statement made by any person in answer to any question put to him on examination under this section shall not (except in the case of perjury) be admissible in evidence against him in any proceeding "civil or criminal." See also R. S. C. ch. 158, sec. 9, the Gaming House Act, where the certificate of protection merely shews that the witness made true and full disclosure and not that he made claim of his privilege. The full and true response is the ground of protection for evidence so given and not that the witness invokes some privilege taken away by the particular enactment.

So also in the provisions of the Larceny Act, R. S. C. ch. 164, sec. 71. The analogous English enactment is commented on in *Regina v. Erdheim*, [1896] 2 Q. B. at pp. 270-1, 3 Mans. B. C. at p. 149, by which answers to a compulsory examination are protected.

No intention to give a merely conditional indemnity appears on the face of the section conditioned on claiming a superseded privilege. Privilege is annulled for the purpose of being conceded, why should it exist for the purpose of being claimed?

Analogous legislation supplies examples of conditional legislation regarding kindred subjects. One statute R. S. C. ch. 9, sec. 39, is cited in *Regina v. Hendershott*; another may also be found in the criminal clauses of the Elections Act, R. S. C. ch. 8, sec. 109, which provides that "no person shall be excused from answering any question put" by the judge, "on the ground of privilege, or on the ground that

the answer will tend to criminate * * ; but no answer given by any person claiming to be excused on the ground of privilege or on the ground that such answer will tend to criminate himself, shall be used in any criminal proceeding against such person other than an indictment of perjury, if the judge * * gives to the witness a certificate that he claimed the right to be excused on either of the grounds aforesaid, and made full and true answer to the satisfaction of the judge."

Judgment.

Boyd, C.

This explicit method of providing that the privilege shall be claimed as a condition to obtaining the certificate is in marked contrast to the silence of the concise enactment now under discussion.

The construction given in *Regina v. Williams*, appears to involve incongruous results which are not to be attributed to the statute unless imperatively demanded by its language. There is no need to introduce a gradation of compulsion which extends the statute and appears to be foreign to its purpose. The witness speaks under lawful duress by virtue of the oath and the direction of the statute. The force of actual and possible compulsion is thus exhausted and there is no room left for any further exercise of constructive compulsion which may well be dispensed with. It is an odd result to hold that the law requires a witness to ask the Judge to excuse him from answering self-criminating questions and at the same time directs the Judge never to excuse a witness from answering such questions.

In the administration of criminal law Mr. Justice Coleridge advises that it is of great importance to proceed on all questions on broad grounds intelligible to the common sense of ordinary people: *Regina v. Wiley* (1850), 2 Den. C. C. 48.

The conclusion now arrived at on the main point agrees with the decision on a New York statute in very nearly the same words as ours where the court held on similar evidence that the witness did not waive his rights by not setting up privilege for it would be a mere formal and

Judgment. useless objection, as he was protected by the statute in giving compulsory evidence: *People v. Sharp* (1887), 107 N. Y. 427, a case cited with approval in the Supreme Court of the United States in *Counselman v. Hitchcock*, (1891), 142 U. S., at p. 582.

Boyd, C.

The answer to the first point reserved should be that the evidence before the coroner given by the defendant was not admissible against him on this trial.

Upon the second question reserved there appears to be no serious objection to the reception of the evidence. There was on the theory of the Crown a plan in the prisoner's mind which was carried out by overt acts shewing that he was accumulating insurance on the life of his wife, and the evidence objected to was as to various applications for insurance, some of which were followed by policies, others not. But all the applications were made practically at the same time and form parts of one transaction which can properly be given in evidence as a whole. Applications were made to the Metropolitan Company on November 25th, 1895, to the Equitable Company on November 26th, and to the New York Company on November 27th. A policy was issued by the Metropolitan on December 13th, 1895, existing at the death. Then came an application to the Provident on January 10th, 1896, followed by a policy on February 4th, 1896, which was also existing at the death. The other applications were not followed by policies. But I think the whole action of the defendant in relation to insurance was properly part of the *res gestæ* and relevant to the case presented by the Crown. The evidence being of a documentary character is not open to objections usually urged against parol testimony proving a series or a cluster of acts connectible with the crime, as forming part of the same transaction, or as done in pursuance of a common design or plan affecting the deceased. It is said in Wills's Circumstantial Evidence, that the principle is that all such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes * * are admissible: 4th ed., p.

47. The practical test in all such cases is whether the matters to be proved are so remote that it is not worth while to let them be proved, and this is rather for the presiding Judge than for an appellate court to determine. This second question should be answered in favour of the evidence being received.

Judgment.

Boyd, C.

ROBERTSON, J. :—

The prisoner was charged with the murder of his wife Katie Hammond. There was previously an enquiry before a coroner and jury, in due form, as to how or by what means the deceased came to her death, at which no particular person was charged with having been privy to her death. The prisoner and the deceased had been lately clandestinely married and under assumed names, in the city of Buffalo. The parents of both resided in Gravenhurst. The deceased had been found on a public street in a dying condition. The prisoner shortly before on the same day or evening had been in her company. He had been for some time engaged as an assistant in a drug store, and had lately commenced the study of the law.

I refer to those facts for the reason in my judgment that they afford a factor necessary to be taken into account to some extent in coming to a correct conclusion as to the first question put in the reserved case, now under consideration.

The Queen's Bench Division of the High Court, sitting as a Criminal Court of Appeal, in two cases—*Regina v. Madden* (1894), 14 C. L. T. 505, and *Regina v. Williams* (1897), very lately decided, and now reported 28 O. R. 583—has decided that the evidence given at the coroner's inquest by the person subsequently charged with the crime, was admissible, on the ground that before giving such evidence he did not claim that such evidence might incriminate him.

Then there is another case, *Regina v. Hendershott and*
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Judgment. *Welter* (1895), 26 O. R. 678, decided by the present Chief Justice of the Common Pleas, who was the trial Judge, in which he disallowed the evidence, notwithstanding the decision in *Regina v. Madden*. In *Regina v. Williams*, I was myself the trial Judge, and having the case of *Regina v. Hendershott* before me, I was so much impressed with the reasoning in it, that I felt bound in conscience to give effect to it and rejected the evidence, but, at the request of the Crown, reserved the case.

As the Courts of Appeal for criminal cases are now constituted, the decision of the Judges of one court is not binding on the Judges sitting in another court of the same jurisdiction. In this respect the law is different as regards civil actions. There is a statutory provision in the Ontario Judicature Act which makes the decision of a court of co-ordinate jurisdiction in civil cases binding, but no such provision exists as regards the Courts of Criminal Appeal. The party, therefore, appealing, has the right to the opinion of the particular court appealed to, as of first instance; that court would, as a matter of course, give all due weight to the opinion expressed by another Court of co-ordinate jurisdiction, and would hesitate before deciding contrary to that opinion, although competent to do so, the remedy being, if it is against the prisoner, to appeal, under section 750 of the Criminal Code, to the Supreme Court of Canada, the Crown having no such right.

Before coming to the main question, I think it necessary to determine whether the coroner's court is a court within the jurisdiction of the Parliament of Canada. In *Regina v. Herford* (1860), 3 E. & E. 115, it was decided that it was a criminal court. Section 568 of the Criminal Code recognizes it as such, and declares that where any person is charged with manslaughter or murder, the coroner shall, if the person affected by such verdict (that is, the verdict of the coroner's court) be not already charged with the said offence before a Justice of the Peace, by warrant under the hand of the coroner, direct that such person be taken into custody, and be conveyed, etc., before

a Justice of the Peace, and it shall be the duty of the Judgment.
coroner to transmit to such Justice the depositions taken Robertson, J.
before him in the matter. And then by the same section
the Justice is required to proceed in all respects as though
such person had been brought before him on a warrant, etc.
This is made necessary for the reason that section 642 of
the Code declares that no one shall be tried on any coron-
er's inquisition. Besides there is the statutory provision
which requires that no person shall be committed for trial
on any criminal charge until he has first had his case
inquired into, on a charge preferred before a justice of the
peace. In the 4th volume of Blackstone's Commentaries
(Lewis's ed.), at p. 274, it is laid down that the coroner's
court is a court of record and a criminal court of the
realm. I think, therefore, there is no doubt that being
such, that the proceedings before the coroner, although no
person was charged, was a matter within the jurisdiction
of the Parliament of Canada.

It appears from the evidence referred to in the reserved
case, that the prisoner Hammond was brought before the
coroner's court as a witness, with other witnesses; he was
sworn to give evidence, and he was examined, not only by
the coroner, but by the Crown Attorney, on behalf of the
Crown. Could he have refused to be sworn, or could he
have refused to give evidence? Had he been charged
with the offence of causing the death of the deceased, there
is no doubt that although under sec. 4 of the Canada Evi-
dence Act, 1893, 56 Vict. ch. 31 (D.) a competent witness,
he could not have been called on behalf of the Crown to
testify against himself. But section 5 declares that "no
person shall be excused from answering any question upon
the ground that the answer to such question may tend to
criminate him, or may tend to establish his liability to a
civil proceeding at the instance of the Crown, or of any
other person: Provided, however, that no evidence so
given shall be used or receivable in evidence against such
person in any criminal proceeding thereafter instituted
against him, other than a prosecution for perjury in giving
such evidence."

Judgment. I have no doubt the prisoner was a competent witness, and was compellable before the coroner, and was so, no matter whether he was interested or not, by reason of interest or crime; and he was bound to answer any question put to him, and could not be excused from answering upon the ground that the answer might criminate him, or tend to criminate him. It is said that he was warned by the coroner, or, as the coroner says, "I cautioned him that it was not necessary to be examined under oath, without he wished to be so, and that any evidence taken might be used against him," and the witness said "he wished to give his evidence." This is taken as a voluntary offer to give evidence which he could have avoided had he felt so disposed. In the first place the coroner was wrong in making this statement to the witness. The coroner had no right to take a mere statement, not under oath, if that was what he meant by stating that it was not necessary to be examined under oath; nor could the witness refuse to give evidence under oath. Section 5 expressly declares that "no person shall be excused from answering," etc., so that the coroner or the Crown, at that inquest, had the absolute right, under this section, to call upon the witness to be sworn and to testify, etc. And here it may be well to examine the circumstances surrounding the witness at that particular juncture. The inquiry was as to how his late wife had come to her death; he was at least suspected of being in some way implicated in her death. Let him be innocent or guilty, when called upon to be and appear as a witness, he would know that the slightest reluctance on his part to tell all he knew about the cause of her death, or the surrounding circumstances would tend to criminate him in the eyes of the jury, and the coroner, and the world. Knowing also, as he must be presumed to have known, the law, he expressed a willingness to do what he could not avoid doing. What else could he do? He had no choice, a refusal would have been useless; he could not be excused; he knew that, and, therefore, he said, "I wish to give evidence." That was not under the circumstances

a voluntary offer to give evidence, and cannot, in my judgment, be urged against him. He was a compellable witness; the law said so, and he must be held to know what the law was. The coroner himself seemed to know that he could compel him to give evidence; otherwise, he would not have sent a constable for him to appear at the inquest. Judgment.
Robertson, J.

The intention of the Evidence Act was to enable the truth to be got at by all reasonable and proper means; in all cases of enquiry into criminal matters it requires and will listen to no excuse on the ground of incrimination, but it protects the witness by not allowing whatever he may be obliged to swear to, to be given in evidence thereafter against him in any criminal proceedings except for perjury, etc. It was contended before us that he might have claimed protection under this same section 5, but I cannot agree to that. The section says, "no person shall be excused from answering," etc. How could he claim protection under the face of that provision? I am at a loss to understand by what process of reasoning that could be so determined.

In *Regina v. Williams*, the learned Chief Justice in his judgment says the reason for holding that the evidence was admissible in *Regina v. Madden*, was that the court was of opinion that the intention of the Legislature as expressed in section 5 was not to exclude evidence tending to criminate voluntarily given, but only such evidence when given under compulsion. With the greatest respect I beg to ask how can it be possible that, when a person who is not charged, is called upon to give evidence under section 5, it can be otherwise than compulsory? This person was not charged; he was called as a witness; he was bound to answer, no excuse as to criminality or otherwise would avail him; but he is assured that whatever he says which may tend to criminate him will not be given in evidence against him thereafter. The words "no evidence so given" mean the evidence given under that section, the very fact of his refusing to answer on the ground of incrimination would not excuse him. The Act

Judgment. intended to protect the witness ; the very fact of sub-section 2 of section 4 prohibiting comment by Judge or counsel for the prosecution in addressing the jury, in case of a person charged failing to give evidence on his own behalf, on the trial, shews that every protection that can be, is afforded the witness. If the Legislature had intended that unless a witness claims privilege before answering a question which may tend to criminate under section 5, it would have been explicit in expressing that intention, as it did in the Controverted Elections Act, R. S. C. ch. 9, sec. 39, which is a similar provision, only that in that case the witness, although not excused, must obtain from the Judge before whom he is compelled to answer a certificate that he claimed the right to be excused on the grounds before stated, and made full and true answers to the satisfaction of the Judge. There is no such provision in the Evidence Act now under discussion. The section itself protects the witness, whereas under the Controverted Elections Act it is the certificate of the Judge which protects him. Before the Evidence Act was passed, it was altogether different ; then no person could be compelled to answer any question the answer to which would criminate or tend to criminate him. Now it is otherwise ; he must answer, if called, but his evidence shall not be receivable in evidence against him, etc.

Let us look at it from another standpoint and for that purpose we will suppose that the witness after answering questions, the answers to which did not criminate or tend to criminate him, is asked, "Did you meet her on the Friday night on which she died?" His answer is "Yes." Then he is asked "Did you give her anything?" He refuses to answer on the ground that the answer may tend to criminate him. Could he be excused? Certainly not ; the section is express, and it makes no provision for claiming privilege. If he merely refused to answer without claiming privilege, under the law before the statute that would not be sufficient ; he was obliged to state the fact that the answer would tend to criminate, etc., and

then the presiding Judge would excuse him, but all that is Judgment. taken away by the statute as it now stands: "The test is Robertson, J. whether he may object to answer. If he may and does not do so, he voluntarily submits to the examination to which he is subjected and such examination is admissible as evidence against him": *per* Jervis, C. J., in a case reserved in *Regina v. Sloggett* (1856), Dears. C. C. 656; at that time there was no law such as we now have under section 5. With the greatest respect, therefore, I cannot come to any other conclusion, than that if the witness had asked to be excused on the ground that his answer would have criminated him, such excuse could not have been entertained; he would have been told "You must answer, but your answer cannot be given in evidence against you, in case of any criminal proceedings hereafter instituted against you, other than for perjury," etc. It, therefore, made no difference whether he objected or not.

I do not think it necessary to pursue the subject further; I have had the advantage of reading the very full, exhaustive and learned judgment just delivered by the Chancellor, in which I fully concur; and in my judgment, the first question must be answered in the negative.

Then as to the second question, I can see no objection to the evidence as to what took place in regard to the applications made by the prisoner to have the life of his then wife insured, and in this I concur with the conclusion come to by the learned Chancellor.

MEREDITH, J.:—

Assuming that the judgment of the Court of Appeal in criminal cases, in *Regina v. Madden* (1894), 14 C. L. T. 505, or in *Regina v. Williams* (1897), 28 O. R. 583, is in no sense binding upon this Court of Appeal in criminal cases, then we are required to again consider the somewhat vexed question, whether a person's depositions, taken at a coroner's inquest, are admissible in evidence against him, upon his trial for the offence which was the subject of that inquisition.

Judgment. The question is whether the whole of such depositions, or only such parts thereof as were not voluntarily given, is, or are, inadmissible.

Meredith, J.

On the one side there is the reported judgment of the *nisi prius* case of *Regina v. Hendershott and Welter* (1895), 26 O. R. 678, approved and followed by the Chancellor in the case of *Regina v. Urlin*, at the Elgin Assizes held at St. Thomas on February 12th, 1896, in which that learned Judge is credited with having said, that he preferred the reasoning in that case to that in the case of *Regina v. Madden*; and also followed by Robertson, J., at the trial of the case of *Regina v. Williams*; in all of which cases the depositions were wholly rejected, on the ground that the Act makes them inadmissible whether the witness objected or not.

On the other side there are the unanimous opinions of two, in the one case, and of the three, in the other, of the Judges of the Queen's Bench Division, sitting as a Court of Appeal, under the provisions of the Criminal Code, 1892, in the cases of *Regina v. Madden* and *Regina v. Williams* above referred to, that such depositions are inadmissible only in so far as the witness has asked to be excused from answering, in effect claimed and by virtue of the Act, been denied, the privilege of silence.

In my judgment the latter cases interpret more correctly than the former, this somewhat ambiguous enactment.

The section in question is in these words: [setting out the section.]

Admittedly the meaning is not plain; obviously, whichever interpretation is accepted, some variation of the words is needed to make it plain.

The section does not in terms provide that no evidence given by any person who testifies in any criminal proceedings shall be used in evidence against such person: nor, on the other hand, that no evidence which such person has objected to give, or has asked to be excused from giving, shall be used against him.

And that being so it is proper to consider what the law

was upon the subject before the enactment, and what was sought to be remedied by it. Judgment.
Meredith, J.

Now, admittedly, the law before was settled that such depositions were admissible in evidence; that if the witness desired to avoid that effect, he should claim the privilege of refusing to answer, on the ground that the answer might tend to criminate him, and so avoid making any self-criminatory admissions.

And the object of the enactment was to take away that privilege in order that the whole evidence bearing upon the subject matter of the trial or investigation might be elicited; but to do so in such a manner as to save the witness to the same extent, as far as possible, as his silence would before have saved him: that is, removing the privilege for the purpose of discovering the truth, yet to leave the witness as well protected as if the privilege had not been taken away. It was not passed to extend any privilege or protection of a witness, but that effect is given to it by the first mentioned cases.

To have done more than that would have been retrogression in the law of evidence, which tends towards the admission rather than the rejection of evidence, leaving the weight of it to the consideration of the jury.

This very Act shews plainly the strong trend, legislatively, towards the admission of evidence in its provisions, that no person shall be incompetent to give evidence by reason of interest or crime, and that every person charged with an offence, and the wife or husband of such person, shall be a competent witness. And now that the person charged can give evidence on his own behalf in denial or explanation of any admissions said to have been made by him, there is room for enlarging rather than curtailing the scope of evidence of admissions or confessions.

These provisions are contained in the third and fourth sections of the Act, and we are asked to construe the next following section as rendering inadmissible evidence which otherwise would be plainly admissible.

If the plain words of the section require it, we must, of

Judgment. course, give the enactment that effect; but if they may
Meredith, J. equally convey the meaning that the safeguard of the witness is to be only as wide as the removal of his privilege, then that interpretation ought to prevail.

Now the words "no person shall be excused from answering any question on the ground that the answer to such question may tend to criminate him," do not, to my mind, indicate an intention to enact an unlimited provision removing all right to object to answer, and indicating to the witness that it is needless to object, or claim the privilege, or to ask to be excused from answering; nor do the words "no evidence so given" seem to me to imply protection against the use of every word of the evidence given, as the words "no evidence given by such person" might. The enactment seems to keep in mind the then existing privilege of silence, and to strike at that only and expressly, making a corresponding and commensurate protection only. "No evidence so given" must refer to excused answers to questions which may tend to criminate, for that is the only "evidence" before referred to in the section. And, having regard to the then state of the law of evidence in criminal matters, "excused answers" mean answers not voluntarily given, but in respect of which the privilege of silence or protection is claimed.

It seems to me that very much that has been said in favour of the inadmissibility of the evidence is the same as was advanced and refuted in the case of *Regina v. Coote* (1873), L. R. 4 P. C. 599.

To say that admissions are not voluntary when made by a witness under oath, is merely to find fault with the cases (binding upon us), which have settled the law to the contrary; and to call a claim to protection an idle form, is also, in a measure, to quarrel with those cases, for they have settled the price of the privilege of silence at the claiming of it: how then can it be so very unreasonable to put the price of the statutory protection at the asking of it?

And the better time to stamp the admissions as voluntary or involuntary is when they are made, not when the

person who made them, under the solemnity of an oath, Judgment.
endeavours to silence them, in order to escape condemnation. Meredith, J.

I can perceive no good reason for thinking that it was meant by the enactment to exclude all admissions made by a witness under oath, even against an expressed desire of the witness when making them, yet that is the effect of holding that the statute makes all the evidence, tending to criminate, inadmissible whether or not privilege or protection is claimed; and it prevents any ruling upon the question whether the evidence may have that effect, at the time it is given.

It is said that a person may be misled if the wider effect is not given to the words "no evidence so given;" that every person is supposed to know the law, and, therefore, to know of this enactment, and to give evidence under it without claiming privilege or asking protection; but that contention helps not at all, for if the enactment have the meaning I have ascribed to it, the witness by like supposition, knows that that is the law; that the law is substantially as it was before; that there must be a claim or request to be excused or objection to answer, otherwise all that is stated stands upon the footing of a voluntary admission. But, doubtless, the witness knows nothing of the law; can hardly know what it is in a case where there is so much judicial difference of opinion upon the subject; and in this particular case the evidence was given quite voluntarily, after warning of what the consequences might be, amounting to dissuasion; and, according to the cases, it was the right of the witness to give evidence; the coroner could not lawfully prevent it: see *Rex v. Scorey* (1748), 1 Leach C. C. 43, and *Wakley v. Cooke* (1849), 4 Exch. 511.

It can hardly have been the intention of Parliament that a man, no matter how learned or how cunning he might be, could force his evidence upon the inquest and yet be wholly protected against anything he might say, but that is the effect of *Regina v. Hendershott and Welter* (1895), 26 O. R. 678, and the cases following it.

Judgment. The ruling in this respect upon this question, based
Meredith, J. altogether upon the authority of *Regina v. Williams* (1897), 28 O. R. 583, was, therefore, in my opinion, right, and should be affirmed.

But before leaving this branch of the case I desire to refer to two points relied upon by the Crown.

The first was that the coroner's inquest was not a criminal proceeding, nor a civil proceeding or matter within the powers of Federal legislation, and so the Act in question did not aid the prisoner.

But the enumeration of a coroner's inquisition *super visum corporis* by Blackstone "among the criminal courts of the nation" is well supported by authority; indeed, I venture to say that nothing to the contrary can be found in any of the books. The authorities are very diligently collected and learnedly dealt with in such cases as *Garnett v. Ferrand* (1827), 6 B. & C. 611; *Regina v. Herford* (1860), 3 E. & E. 115, and *Thomas v. Chirton* (1862), 2 B. & S. 475; and, as they all point that one way, nothing will be gained by my doing more than referring to them.

The fact that the results of such inquisition have been to some extent curtailed (see Criminal Code, 1892, 55-56 Vict. ch. 29, secs. 568, 642), cannot affect the character of the proceedings.

The other point, namely, that the "person" referred to in section 5 is the person referred to in section 4, that is, the person charged only, was not abandoned by Mr. Cartwright, but is without weight. The word "person" in section 5 no doubt means "person under examination as a witness," or, shortly, "witness."

As to the other question reserved for our consideration I am also of opinion that the ruling at the trial was right and ought to be affirmed.

If the evidence in question had been tendered for the sole purpose of shewing a motive for the crime, existing at the time of death, and would have that effect only, there would be much in Mr. Johnston's contention, and I would

probably have rejected it on the ground of remoteness, if Judgment.
not irrelevance.

Meredith, J.

But that was not its purpose or effect. Its purpose was to shew, in connection with the other evidence, an intention in the prisoner, and a scheme conceived by him at or before the time of the applications for the life insurance, to obtain as much of such insurance as he could upon his wife's life and then by some foul means or other end it, and, therefore, whatever weight this evidence may have had, it seems to me that it could not have been rightly rejected. And besides this, the applications for insurance which were effected and the applications which failed of effect, were made for the like purpose, at the same time, and under the same, or the like, circumstances, and the details of those of the one class could hardly be given without to some extent at least referring to the others, the whole being a somewhat intermingled story of the prisoner's efforts to make, according to the contention of the Crown, a profit of his wife's death.

A. H. F. L.

MAGANN V. FERGUSON.

Bankruptcy and Insolvency—Unliquidated Claim—Double Value—Overholding Tenant—4 Geo. II. ch. 28, sec. 1—Preferential Claim—Rent—R. S. O. 1897, ch. 147.

A claim for damages against an over-holding tenant for double the yearly value of the land under 4 Geo. II. ch. 28, sec. 1, is an unliquidated claim, and therefore is not proveable against an estate in the hands of an assignee for creditors under R. S. O. 1897, ch. 147.

A landlord has no preferential claim for rent against such an estate, if there were no distrainable goods on the premises at the time of the assignment.

THIS was a case stated in an action wherein G. P. Statement.
Magann was plaintiff, and John Ferguson, assignee for creditors of the estate of James Bonner was defendant.

The case set out that by lease of June 26th, 1895, Margaret Henderson demised to James Bonner a certain

Statement. property for two years from July 1st, 1895, at \$105 per month, and the lease provided that on a *bond fide* sale being made, the lessor might terminate the lease at any time after October 1st, 1895, on giving three months' notice in writing: that on April 2nd, 1896, Margaret Henderson sold and conveyed the property to the plaintiff, and on September 24th, 1896, she and the plaintiff served Bonner with notice of the sale and of intention to terminate the lease at the expiration of three months: that Bonner did not deliver up possession as demanded, and on December 31st, 1896, the plaintiff commenced action for recovery of possession, and for rent and damages for wrongful detention of the premises: that on March 23rd, 1897, Bonner made an assignment for the benefit of his creditors to one Gardner, who on March 24th, 1897, removed all his stock-in-trade and assets off the premises, and gave the key to the plaintiff: that the creditors did not assent to this assignment to Gardner, and on March 25th, 1897, Bonner assigned to the defendant, which was duly consented to by the majority of the creditors, and Ferguson demanded and obtained from Gardner the stock-in-trade and assets: that at the time of the last mentioned assignment Bonner was not in possession of the plaintiff's premises, and there were no assets of his thereon: that the action of the plaintiff against Bonner was tried on September 27th, 1897, and the latter consented to judgment for \$630 as damages for wrongful detention under the statute 4 Geo. II. ch. 28, and for \$84.50 as for balance of rent due, and costs: that the plaintiff had filed claims with the defendant, but the latter declined to recognize his claim for damages or for costs, except as to the \$84.50 as an ordinary creditor. The Court was asked whether the plaintiff was entitled to rank as a preferred creditor on the estate of Bonner in the defendant's hands for any sum whatever for rent accrued due prior to the assignment, and if so, for how much; whether he was entitled to three months' rent following the assignment in full as a preferred creditor; if not, whether he was entitled to rank with the other ordinary

creditors for such rent; and whether he was entitled to rank as an ordinary creditor for the \$630 damages, and for the costs of the action aforesaid. Statement.

The case was argued on March 8th, 1898, before MEREDITH, C. J.

A. C. Macdonell, for the plaintiff, referred to 4 Geo. II. ch. 28, sec. 1, under which the above damages had been recovered, as "at the rate of double the yearly value of the lands" detained by the tenant wilfully holding over after the determination of the term and notice in writing given for delivery up of possession. He contended that no distress was necessary to preserve the landlord's claim, and cited *Clarke v. Reid* (1896), 27 O. R. 618; and *Linton v. Imperial Hotel Co.* (1889), 16 A. R. 337.

N. W. Rowell, was not called on.

Per Curiam.—All the questions must be answered in the negative: *Grant v. West* (1896), 23 A. R. 533, shews that there is no right to claim for unliquidated damages. The statute 4 Geo. II. ch. 28, sec. 1, does not make the damages thereby given liquidated. Yearly value is unliquidated, and to be determined by the proper tribunal; and the statute applies a further liability equal to that. Possibly the Legislature will remedy an obvious defect in the Act respecting Assignments for Creditors, now R. S. O. ch. 147, and make such an unliquidated claim as this proveable. As to the landlord's right under the first assignment, that not having been made in conformity with the provisions of the Act was ineffectual. The rights of the parties depend on the second assignment, when there were no goods on the premises.

A. H. F. L.

[DIVISIONAL COURT.]

MINHINNICK V. JOLLY.

Fixtures—Negotiations for Sale—Intention to Sever—Subsequent Purchaser of Freehold—Rights of.

The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another, even if communicated to one who becomes a subsequent purchaser of the freehold, will not operate to convert the fixture into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser.

Judgment of MEREDITH, J., reversed.

Statement. THIS was an appeal from the judgment at the trial in an action tried at London on the 15th November, 1897, before MEREDITH, J., without a jury, brought by John R. Minhinnick against George C. Jolly.

The following facts are taken from the judgment of STREET, J., in the Divisional Court.

This action was brought to recover the value of an engine or for delivery of it to the plaintiff. The defendant claimed the engine as part of the freehold of certain lands in the city of London conveyed to him by one Fraser, to which it was affixed. The plaintiff replied that the engine was sold to him by one Labatt for whom Fraser was trustee, and that the defendant had notice of the sale before he purchased, and agreed that the engine should not pass by the sale. The defendant rejoined denying notice and the other facts alleged by the plaintiff and setting up that the sale to the plaintiff was invalid under the Statute of Frauds.

T. G. Meredith, for the plaintiff.

Edmund Meredith, Q.C., and *F. Love*, for the defendant.

It appeared from the evidence that Fraser as trustee for Labatt was mortgagee in possession of a factory in London containing the engine in question, two boilers, and other

machinery. The engine and boilers were securely attached to the freehold and had been for some years. Statement.

In January, 1897, the factory took fire and was partially destroyed and Labatt determined to sell the land and machinery as best he could either together or separately, and employed the defendant as his agent for that purpose.

Labatt and the plaintiff and two other persons were engaged in boring for oil at Bothwell, the plaintiff being in the actual control and management of the operations there. Some weeks after the fire the plaintiff told Labatt that he would need the boilers for the work there and perhaps the engine as well and asked his price, whereupon Labatt named \$200 as the price of the boilers and \$200 as the price of the engine. The plaintiff agreed to purchase the boilers and said he would not decide as to the engine for the present but would like to have the option of taking it later on if he wished, to which Labatt assented, no time being mentioned.

On 3rd May, 1897, Fraser acting for Labatt contracted to sell the property to the defendant for \$3,550, and executed a conveyance to him in the usual statutory form on 27th May, 1897.

It was admitted by the defendant that at the time he purchased he was aware of the sale of the boilers to the plaintiff and allowed him to remove them, between the 5th May and 17th May without objection but he absolutely denied notice of any sale of the engine. A clerk of Labatt's swore that he had mentioned to defendant in March that the engine and boilers had both been sold to Minhinnick, the plaintiff, but this the defendant denied.

Some time after the conveyance to the defendant the plaintiff decided to take the engine but the defendant claimed it under his conveyance and refused to give it up, whereupon this action was brought upon Labatt's instructions. The learned Judge who tried the case delivered the following judgment at the close of the evidence:—

Judgment. November 15th, 1897. MEREDITH, J. :—

Meredith, J.

It seems to me that the real question for determination here is one of fact, not complicated to any extent with any question of law. And that question of fact is one depending on the credibility of the testimony; whether I am to place dependence on the testimony for the plaintiff, or on that given in behalf of the defendant.

It is true that at first sight the defendant comes with a very strong case. He says, "I have a document here signed by Mr. Labatt which in law conveys to me the land and everything that is affixed to the land." But the force of that is plainly gone the moment that he admits that he cannot make so large a claim as that; that he cannot claim any right to either of the boilers. That opens the gate to *vivâ voce* evidence. That compels me to determine this question, not upon the construction of the documents, but upon the weight of the testimony.

The owner of the land was in law entitled to deal with the land as he saw fit. He had a right to sever the fixtures from the land; and that he intended to do so is obvious. It is obvious not only from his own acts but from the acts of the defendant. They both desired, in Mr. Labatt's interests, and both endeavoured, in his interests, to sell the fixtures apart from the land. And they both endeavoured, in his interests, to sell the whole together.

So we start with this, that there was the idea of a sale of the fixtures separate from the land, and that idea was conveyed to every one concerned; was acted upon by both parties. Then we have the fact, for I must find it to be a fact, that there was a sale by Mr. Labatt to the plaintiff of the boilers, and a right given to the plaintiff to take the engine also, at the price of \$200. That agreement I interpret as a contract to sell the engine for \$200 to the plaintiff, if he should elect to take it and pay for it within a reasonable time. I also find as a fact that he did elect to take and pay for the engine within a reasonable time. I cannot bring my mind to any such conclusion as that this

is a scheme on the part of the plaintiff and Mr. Labatt to obtain for the benefit of the latter the value of this engine without there being in reality a sale from the one to the other. Judgment.
Meredith, J.

I do not see much, if anything, in the objection that other persons were concerned in that purchase. That may be so. The ultimate result might have been beneficial to many persons; but the purchase was by the plaintiff. The purchase of the boilers was made by, and the right to purchase the engine was given to, the plaintiff, not to his company or to any partnership. That disposes of this objection; an objection which really does not touch the merits of the case—the question the parties really wish determined. As far as this objection is concerned I see no reason for adding parties.

Then comes the difficult question; for I have no manner of doubt that all these witnesses have endeavoured to tell the truth. Each one of them has been quite conscientious in all that he has said, but there is a mistake somewhere. It is the recollection of one side or the other that is at fault. The testimony of each was given in a way that impressed me with the honesty of intention of each person who went into the witness box. And the defendant, to his credit, put his case in what I conceive to be a most fair and just manner. He, in effect, said "I had no notice of any transaction in regard to the engine and therefore I claim it," and, if that be so, his claim seems to me to be entirely a just and proper one, and he should have judgment in his favour. On the other hand he says "If I had as a matter of fact notice that I was not to have the engine, that there had been any sale, or any conditional sale, or optional sale, of it, then I do not claim it."

His testimony is not in accord with the testimony of Mr. Labatt, or of Mr. Raymond or of Mr. Fraser. The weight of testimony is against him. If what Mr. Labatt says is correct then what the defendant says cannot be correct. If what Mr. Raymond says is correct then what the defendant says cannot be correct: and I think I may

Judgment. add, if what Mr. Fraser says is correct then what the
Meredith, J. defendant says cannot be correct—dealing even with this question of the engine. But I do not think there was any room for misunderstanding or misconception in what took place between them, it is memory only that is at fault.

As against these three witnesses I am not able to say that Mr. Jolly's recollection of what took place ought to be accepted. The probabilities of the case seem to me to be rather against his recollection. There had been these attempts to sell; they were dealing with the properties as two, not as one, with the land as one thing, with such of the machinery as was left as another thing. He himself was purchasing the land for a purpose in which the machinery would be useless. He has put the property to that use, that is to say, he bought the property for, and has converted it into, residential property, having no kind of use for this particular, or any, machinery.

Then there was the change in the advertisements, not a change clearly indicating that notice was given to the defendant, because it does not merely strike out the advertisement of the sale of these three articles, but it changes the form of the advertisement altogether. So, though perhaps not a very strong circumstance, it is a circumstance in favour of the plaintiff's contention and against that of the defendant, in favour of what Mr. Raymond says, that the alteration was made, and the advertisement was inserted, after and in consequence of the defendant being informed that the boilers and engine had been sold, and he then desiring to know whether he should be continued as the agent for the sale of what remained of the property.

My conclusion, therefore, upon this question of fact is that there was notice of this transaction to the defendant, and that in reality he purchased the land without the machinery; that his recollection of the matter is not as good as that of the other three witnesses.

I must, therefore, find in favour of the plaintiff, and hold him entitled to the possession, or the value, of this piece of

machinery, the engine; and the best disposition of that question of damages I can make is this—that the plaintiff should have the engine, or he should have \$350 damages, whichever the defendant chooses. The plaintiff has said he is yet ready to take the engine, and I think that the removal of it, and what the defendant has done to it, ought to compensate the plaintiff for any damages he may have sustained by reason of being prevented from getting it at the time he desired it. On the other hand, if the defendant insist on retaining the engine he ought to pay reasonable damages, which I fix at \$350. The plaintiff is entitled to his costs of the action.

Judgment.
Meredith, J.

From this judgment the defendant appealed and the appeal was argued on 2nd February, 1898, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

Aylesworth, Q.C., for the appeal. The rights of the parties are disposed of as a matter of fact but should have been treated as a matter of law on the plaintiff's case. The engine was a fixture. The realty was sold to the defendant while the engine was a fixture. The evidence of the plaintiff that he might want the engine later and the owner of the property telling him he would not sell it to any one else was no severance. The evidence does not shew a previous sale of the engine and even if it did the defendant purchased it attached to the freehold without any information or notice of any such sale. There was no reservation in the deed and the vendor could not derogate from his own grant.

N. W. Rowell, contra. The real question is one of fact depending on the intention of the parties: the defendant as agent of the owner to effect a sale knew that the owner never intended that the engine should pass by a sale of the freehold. The owner had the right to sever these chattels from the realty. The evidence shews a separate sale of the boilers and engine before the defen-

Argument. dant purchased the realty and that the defendant was informed of it, which operated as a severance. His acquiescence in the boilers being removed after his purchase shews his knowledge of and consent to the plaintiff's purchase: *Hallen v. Runder* (1834), 1 C. M. & R. 266; *Rose v. Hope* (1872), 22 C. P. 482; *Argles v. McMath* (1895), 26 O. R. 224; *Dewar v. Mallory* (1879), 26 Gr. 618. The conveyance does not shew the whole contract and as the intention was that the fixtures should not pass the oral evidence was properly received: *Amos and Ferard's Law of Fixtures*, 3rd ed. 329, 330, 331 and 334; *Le Targe v. De Tuyll* (1850), 1 Gr. 227, at p. 235.

Aylesworth, Q.C., in reply. The conveyance was made after all the conversations and no parol evidence should be admitted; I refer to *Carroll v. The Provincial Natural Gas, etc., Co.* (1896), 26 S. C. R. 181; *Teebay v. Manchester, Sheffield and Lincolnshire R. W Co.* (1883), 24 Ch. D. 572; *Walton v. Jarvis* (1856), 13 U. C. R. 616; 14 U. C. R. 640.

February 2nd, 1898. The judgment of the Court was delivered by

STREET, J. :—

The engine in question herein with the boilers were affixed to the freehold by the owner in fee in such a manner as undoubtedly made them part of it, and as part of it they passed to the mortgagee. They have become the property of the defendant by virtue of the conveyance to him by the mortgagee of the freehold of which they formed part, unless they had previously been detached from it by a contract of which the defendant had notice.

My brother Meredith has held that at the time of the sale to the defendant a contract existed for the sale of both the engine and the boilers to the plaintiff by Labatt and that the defendant had notice of it before he purchased.

After a careful examination of the evidence, which upon

this point is that of the plaintiff and Labatt uncontradicted by the defendant, I am unable to concur in the finding that any valid contract existed between Labatt and Minhinnick at the time the defendant purchased the freehold.

Judgment.

Street, J.

The account given by Labatt of the sale is as follows : He is asked, "What was the arrangement with Minhinnick?" and he answers "He asked me my price and I said \$400 for the engine and the two boilers. Then he asked me my price for the boilers and for the engine. I told him \$200 for the boilers and \$200 for the engine." He said, "I will take the boilers and I think I will require the engine," and I says, "I will keep it till you decide," and he said "all right." This was at the end of March or the beginning of April and it was not until the following June that Minhinnick told Labatt he wished to take the engine. In the meantime the freehold had been sold and conveyed to the defendant.

Minhinnick's account of the matter is very similar. Being asked whether he made any arrangement with Mr. Labatt with regard to the purchase of the engine and boilers he says, "Well, I got the option of the engine and boilers, at least Mr. Labatt gave me a price on them and I told him afterwards I would take the boilers and I would let him know later whether I would take the engine or not," and being asked "Did Mr. Labatt say anything to you about selling the engine to any one else?" he replied, "He said he would not sell it till I would let him know. That was his own suggestion."

The fact of the sale of the boilers was made known to the defendant before his purchase and they were removed with his consent after his purchase of the freehold. Whether he was aware of what had taken place between Labatt and Minhinnick with regard to the engine appears to me to be immaterial. It was merely a voluntary offer on Labatt's part not to sell the engine to any one else until Minhinnick should make up his mind whether he would take it or not, made without consideration and not acted upon by Minhinnick until after the conveyance to the defendant.

Judgment.

Street, J.

The mere expression by Labatt of an intention to sever the engine and sell it to Minhinnick in case the latter should determine to buy it, even though communicated to the defendant could not operate to convert a part of the freehold into a chattel or to alter its character in any way. That could only be done by an actual severance, or by a contract for an actual severance, from the freehold of which it formed part. So that if the defendant had been actually present and had heard the whole conversation between Labatt and Minhinnick with regard to the engine he might afterwards have taken, as he did, a conveyance of the freehold including the engine, from Labatt's trustee, Fraser, without at all regarding the promise to Minhinnick because it was one which Labatt might disregard with impunity.

The engine was a part of the freehold and subject to no contract when the defendant on the 3rd of May became the purchaser of the freehold or on the 27th of May when the freehold was conveyed to him; and the authorities are clear that in the absence of any reservation in the conveyance everything attached to the freehold passed as between Labatt and the defendant notwithstanding any previous conversation or negotiation between the parties: *Carroll v. Provincial Natural Gas, etc., Co.* (1896), 26 S. C. R. 181.

The plaintiff fails, therefore, in the action because the uncontradicted evidence must be held to prove that the defendant purchased the engine from Labatt on the 3rd of May, 1897, and that the plaintiff acquired no interest in it until June, 1897.

The appeal should be allowed with costs and the action should be dismissed with costs.

G. A. E.

McDONALD V. THE LAKE SIMCOE ICE AND COLD STORAGE
COMPANY.

*Water and Watercourses—Navigation—Carriage of Ice—Right to Cut
Passage Through Harbour.*

The cutting of a channel through ice formed on a water lot in a navigable harbour, to enable ice cut outside to be conveyed to the shore of the harbour, is a use of the water lot for the purposes of navigation; and the owner of the water lot, the grant of which was subject to the rights of navigation, cannot interfere with such user.

THIS was an action tried at Toronto, before MACMAHON, *Statement*. J., without a jury, on the 25th October, 1897.

The case had previously come on for trial before the Chancellor, when he directed that it should stand over until the Minister of Justice and the Attorney-General for Ontario had been notified. Such notice was accordingly given; but they declined to intervene or be represented at the trial.

The facts so far as material are set out in the judgment of MACMAHON, J.

W. Macdonald, for the plaintiff.

R. U. McPherson, and *George C. Campbell*, for the defendants.

January 29, 1898. MACMAHON, J.:—

This is an action of trespass in entering on the plaintiff's water lot in front of lot 2 in the 9th concession of the township of Georgina, after the formation of ice thereon, and cutting and destroying the same.

A patent for the above water lot was issued by the Province of Ontario on the 2nd of October, 1878, and contains the following proviso: "Provided nevertheless this grant is made upon the express understanding that whenever the Lake Simcoe Junction Railway Company shall

Judgment. have completed their railway to Jackson's Point and shall
MacMahon, actually require for a dock or otherwise for railway purposes the water lot, portion of the water (*sic*) lot hereby granted, shewn on a plan or survey by P. L. S., H. J. and W. A. Browne, dated 20th September, 1877, of record in the Department of Crown Lands, marked "A." a copy of which is attached to these letters patent, then the said Levi Miller (the patentee) his heirs or assigns shall sell to the said railway company the said secondly mentioned water lot at the same price, namely four dollars per acre with interest from the date hereof."

The patent also contained the following reservation: "Saving, excepting and reserving nevertheless unto us our heirs and successors the free user, passage and enjoyment of, in, over and upon all navigable waters that shall or may be thereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

William Boucher was grantee from the Crown, by a patent issued on the 16th of October, 1819, of broken lots 1 and 2 in the 8th and 9th concessions and a broken lot in the 7th concession of Georgina, containing 520 acres. The description of the north-westerly boundary is "along the water's edge of Lake Simcoe to the allowance for road between the townships of Georgina and North Gwillimbury."

Levi Miller, being the owner in fee of broken lots 1 and 2 in the 9th concession of the township of Georgina, on the 29th of November, 1878, conveyed to the Lake Simcoe Junction Railway Company a right of way through part of lot 1 in the 9th concession, being 66 feet wide to the water's edge of Lake Simcoe, as shewn on a plan filed; also part of water lot in front of lot number 1 in the said 9th concession of Georgina, containing one acre and seventy-three one-hundredths of an acre, commencing at the high water mark of Lake Simcoe and running into the lake about 200 feet, with a width of about 180 feet, as appears by the plan filed.

Miller on the 11th of January, 1896, conveyed to the plaintiff broken lots 1 and 2 in the 9th concession of Georgina, excepting thereout the land owned by the Lake Simcoe Junction Railway Company, being four acres and a half, and other parts of said lots theretofore sold. "Secondly, water lot in front of lot number 2 in the 9th concession of Georgina, excepting thereout that portion thereof heretofore conveyed to the Lake Simcoe Junction Railway Company and that portion sold to one Susannah Anderson."

Judgment.
MacMahon,
J.

The defendants in their statement of defence:

(3) Deny that the plaintiff is the owner of the ice formed upon the water lot;

(8) The said water lot so sold and conveyed to the Lake Simcoe Junction Railway, and now the property of the Grand Trunk Railway Company of Canada, formed part of the water lot claimed by the plaintiff and described in the statement of claim; and the plaintiff has not and never had any right, title or interest whatsoever therein.

(9) The remainder of the water lots claimed by the plaintiff extend in front and on both sides of the said dock of the Grand Trunk Railway Company, and are covered by navigable waters and constitute the bed of a public harbour, being an inlet of Lake Simcoe, a large body of navigable water.

(10) The Grand Trunk Railway Company of Canada have for years leased part of the said dock for the purposes of storing ice thereon; and, during the year 1895, they leased to the defendants part of the said dock, for the purpose of erecting thereon a large storehouse for storing ice, and such storehouse was built and used by the defendants for such purpose before and during the ice season of 1896-7.

(11) The defendants also secured from the Grand Trunk Railway Company and from the defendants' predecessors in title the right to use the said dock and water lot of the Railway Company and the right of way over the water lots claimed herein by the plaintiff, for hauling, landing

Judgment. and storing ice for the purposes of the defendants' business
MaoMahon, J. and of the business of the said railway company.

(12) The defendants deny that they entered upon or in any way interfered with the property of the plaintiff or that they did any acts not necessary for the due and proper exercise of their rights in the premises, including their right of way over, through and across the said navigable waters, and their right of free and uninterrupted navigation therein and thereon, and their right of access to and from the said wharf and dock and the storehouse of the defendants situate thereon.

The water in the bay is of sufficient depth to enable vessels drawing eight or eight and a half feet to come to the plaintiff's dock at Jackson's Point or to the Grand Trunk Railway wharf.

[The learned Judge then set out the evidence of user of the harbour by various vessels from 1838 to the present time, and continued :

This bay was regarded both by vessel owners and navigators as a good and safe harbour and was so used by them for sixty years.

The defendants were lessees from the Grand Trunk Railway of an ice-house, on or close to the railway wharf, capable of storing about five thousand tons of ice. A railway switch ran to this ice-house for convenience of the defendants in shipping their ice.

The ice cut by the defendants was cut outside of the line of the plaintiff's water lot, as described in the grant, and in order to harvest it they cut passages about five feet wide through the ice in the bay to the Grand Trunk Railway wharf, through which the ice intended to be stored was pushed and hauled up to the ice-house. By means of the passages so cut (which combined measured about one-quarter of an acre in extent) the cost of handling and storing the ice was greatly reduced. The ice which was cut so as to form the passage ways was pushed under the general ice field.

The patent to Miller of the water lot was granted under

sec. 47 of R. S. O., 1887, ch. 24, which enacts that "It has been heretofore, and it shall be hereafter lawful for the Lieutenant-Governor in Council to authorize sales or appropriations of land covered with water in the harbours, rivers and other navigable waters in Ontario, under such conditions as it has been or it may be, deemed requisite to impose, but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water."

Judgment.
MacMahon,
J.

The words in this section, "but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water," were, as was pointed out by Wilson, C. J., in *Warin v. London Loan Co.* (1885), 7 O. R. 706, at p. 724, "added *ex abundanti*, for the grant must have been subordinate to the public rights." And this subordination to public rights where an interest is lodged in a subject in navigable waters, is thus stated in Hale's *De Jure Maris*, as given at p. xx. in the appendix to Hall on the Sea Shore, 2nd ed.: "This interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats; for that is prohibited by the common law, * * : for the *jus privatum*, that is acquired by the subject either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers or arms of the sea are affected for public use."

Assuming that this was, as contended by counsel for the plaintiff, not a *public harbour*, and therefore the power to make the grant of the land covered by water in this harbour existed in the common right of the Province, then (without considering for the present the rights of the Grand Trunk Railway Company as riparian owners, and also, as the grantees from Miller, the owners of a portion of land covered by water) what are the rights of the plaintiff, who is one of the riparian owners as well as an owner of part of the water lot?

In *Ratté v. Booth* (1886), 11 O. R. 491, the plaintiff was a riparian owner, and, under the authority conferred by 23

Judgment. Vict. ch. 2, sec. 35, on the Crown to grant water lots in the harbours, rivers and other navigable waters in Upper Canada "under such conditions as it has been or it may be deemed requisite to impose," a grant was made of a certain water lot on the Ottawa river, the description in the patent covering the water front and two chains distant from the shore, on which water lot a floating wharf was maintained. The patent imposed no conditions, but there was a reservation similar to that contained in the patent to Miller in this case, by which there is reserved to the Crown "the free user, passage and enjoyment over all navigable waters that may be found," etc. The Chancellor in his judgment in that case, at p. 497, as to the grant in the patent, said: "The effect of the grant is to pass all the right of property possessed by the Crown in the land and water, subject to the public easement. The grant of the river bed two chains out carries as parcel of it, the water thereon, so that we have to this extent the bed, the bank, and the water vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation. In brief, the use of the river *quoad* this locality is public, but the property therein is private." And as to the effect of the restriction, he said: "It is restricted to the free use, passage, and enjoyment of, in, over, and upon navigable waters which are upon any part of the parcel conveyed, and such a reservation is not of a proprietary but of a usufructuary enjoyment. This clause is intended to preserve that right of the public to navigate which is paramount to any right of property in the Crown: *Williams v. Wilcox* (1838), 8 A. & E. 314."

The plaintiff's right to maintain the action was affirmed in 14 A. R. 419, and (1890), 15 App. Cas. 188. In the Court of Appeal (1887), Hagarty, C.J.O., and Osler, J.A., held that the plaintiff was in the position of a riparian proprietor and had the same right to the water as the rest of the public. Patterson, J. A., held that the plaintiff was a riparian proprietor, and that the reservation in the grant of "the free

use, passage and enjoyment * * of all navigable waters," considered as an exception was void as repugnant to the license, and that the whole lot vested in A. (the grantee) free from the asserted *jus publicum*. Burton, J. A., held that the statute 23 Vict. ch. 2, sec. 35, gave to the Crown the right to grant the bed of the river and the water upon it free from any right *publici juris*. Judgment.
MacMahon,
J.

The Judicial Committee, in delivering its opinion, 15 App. Cas., at p. 193, said: "As a riparian owner the plaintiff would be at liberty to construct such a wharf and would be entitled to maintain an action for the injuries of which he complained." This agrees with the opinions expressed by Hagarty, C. J. O., and Osler, J. A.

Whatever may have been the authority conferred upon the Crown by 23 Vict. ch. 2, sec. 35, in making grants of land covered by navigable waters free from the *jus publicum*, such right no longer exists, as R. S. O. ch. 24, sec. 47, says such grants are not to "interfere with the use of a harbour as a harbour, or with the navigation of any harbour, river or other navigable water."

The plaintiff being owner of the soil in this bay, may erect thereon such wharves, docks, or other structures, as he might require, so long as no obstruction is thereby caused to navigation and no injury to the rights of other riparian owners.

Then has the plaintiff a right of property in the water in this navigable bay? The right of enjoyment in a riparian proprietor in a navigable or non-navigable river, is, as said by Parke, B., in *Embrey v. Owen* (1851), 6 Ex. 353, at p. 369, "the right to have the stream flow in its natural state, without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may

Judgment.
MacMahon,
J.

choose to abstract from the stream and take into his possession, and that during the time of his possession, only." And the law thus stated as to riparian proprietors by Baron Parke was restated in similar terms by him when Lord Wensleydale, in *Chasemore v. Richards* (1859), 7 H. L. C. 349. And Lord Chancellor Cairns, in *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 663, at p. 674, said: "The riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation."

In Coulson & Forbes' Law of Waters, at p. 74, the authors point out that although the cases of *Bickett v. Morris* (1866), L. R. 1 H. L. Sc. 47, and *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, do not relate to tidal rivers, "but as they define the rights of the owners of the beds of rivers generally, and state broadly the laws with regard to such rights, it is submitted that the principles established by them should apply, *mutatis mutandis* to the Crown and its grantees as owners of the beds of tidal navigable rivers."

In *Orr Ewing v. Colquhoun*, at p. 846, Lord Chancellor Hatherley said: "The right of navigation is simply a right of way, and with that right of way you must not interfere in any manner by any course you take." Lord Blackburn's judgment, at p. 861, is to the like effect. Lord Gordon, at p. 871, says: "The rights of the public are of a limited nature. They possess no rights of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties." Lord Selborne, in *Lyon v. Fishmongers* (1876), 1 App. Cas., at p. 683, said: "The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the

running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it." And in *North Shore Railway Company v. Pion* (1889), 14 App. Cas. 612, it is clearly stated that there is no distinction in principle between riparian rights on the banks of navigable, or tidal, and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation.

Judgment.
MacMahon,
J.

There being, according to the authorities, no exclusive property in the water, except such portion as a riparian owner, or the owner of the soil covered by water, severs from the general body, is the right in any way changed or enlarged by the water being congealed and so formed into ice?

In *Gould on Waters*, p. 191, it is said: "Ice forming on a navigable fresh water stream, the bed of which belongs to the riparian proprietors, is considered part of the realty, as an accretion, and a person who appropriates for his own gain can not justify the trespass on the ground that its removal was advantageous to the public easement of navigation": *Washington Ice Co. v. Shortall* (1881), 101 Ill. 46. And in *Lorman v. Benson* (1860), 8 Mich. 18, at p. 32, which was an action by a riparian owner on the Detroit river, it was held that, subject to the rights of navigation, which were paramount to all other rights, "the plaintiff was entitled to every beneficial use of the property in question which can be exercised with due regard to the common easement. The cutting of ice is the exercise of a valuable privilege in securing that which has become stationary to the freehold, and we conceive of no reason which would justify a denial of it." This case was cited with approval by the Supreme Court of Ohio, in *Hogg v. Beerman*, 41 Ohio (1884), 81, at p. 96. See also *People's Ice Co. v. Steamer Excelsior* (1880), 44 Mich. 229.

The action of *Cullerton v. Miller* (1894), 26 O. R. 36, was to test the right of Miller, the grantee from the Crown of the water lot referred to in the case in hand, to prevent Cul

Judgment. lerton (the plaintiff) from hauling ice cut from the lake, over such lots when frozen, to the wharf, from which the plaintiff desired to ship the ice for the purposes of his business, unless Cullerton paid toll, which he refused to do. And Mr. Justice Rose, who tried the case, in delivering his opinion, said, pp. 40, 41 : "The water is a highway for the purpose of reaching the wharf, and I see no distinction in principle between the water being in a fluid condition and being congealed. I think the plaintiff has the same right to traverse the water lot for the purpose of reaching the wharf whether the water be fluid or frozen into ice. I think the word 'water' must be read, having regard to the climate and the necessities of the case, and the convenience of trade, as covering both water in a fluid and water in its congealed state, because a contrary conclusion would go the length of preventing the company which has the wharf from going out into the lake and gathering ice and bringing it to its wharf. * * * In a word, I think the water over the defendant's lot is a highway, which the plaintiff may traverse, may go upon and cross in any vehicle necessary for the purpose of using such highway, and that such use of the highway is within the meaning of the words or term, 'navigation of the waters.' I do not see why navigation for the purposes for which the highway is used should be confined to the summer months to the exclusion of the carrying on of trade and commerce in any form, or to the destruction of any business rights."

This bay being a common highway, and the rights of navigation being paramount even to that of the Crown, the plaintiff's rights are subordinate to the use by every subject of the waters for the purposes of navigation, who could remove any obstruction to such highway that in any manner impeded navigation. (*Williams v. Wilcox* (1838), 8 A. & E. 314, at p. 329.) And, therefore, had the defendants been coming to the Grand Trunk Railway wharf with a schooner or barge laden with grain, and found the bay frozen over, they, in the exercise of the undoubted rights of navigation, could have cut a way through the

ice for the passage of the vessel. The right to cut a passage through the ice under such circumstances was admitted by plaintiff's counsel; but he controverted the proposition that if defendants had a schooner filled with fish caught in open water a few hundred yards away, they could lawfully cut a channel through the ice in this bay to reach the railway wharf. His contention, in effect being, that the question of the right of navigation in the public cannot arise after the formation of the ice, except in the single instance where a vessel with her cargo was caught outside the harbour after the ice had formed. I fail to see that any valid distinction can be drawn between the cases put. If the defendants could remove any obstruction in the nature of ice from this navigable highway for the purpose of bringing in a cargo of grain, they could certainly remove it for other purposes connected with such navigation. The rights of the public over this easement include not only navigation in boats and vessels, but also floating, and travel over the ice: English and American Encyclopædia of Law, vol. 6, p. 259. Had the defendants, therefore, brought a raft of logs or square timber in tow of a propeller and found the bay covered with ice, the propeller could have broken its way through and made a channel for the passage of the logs and thus deliver them at the Grand Trunk Railway wharf. That the defendants could have done under their right over this public navigable water; or, if it was found that the propeller was not powerful enough to crush the ice, they could have cut a channel through the ice and by means of poles pushed the logs through such channel to the railway wharf.

Judgment.
MacMahon,
J.

There is nothing to prevent the defendants from cutting a passage through the ice in the bay in order to reach the wharf and harvest their ice crop. Ice is an article of commerce, and the business of cutting and storing it has assumed vast proportions; capital to a very large amount being invested therein.

Were it the case that any person requiring to use this

Judgment.
MacMahon,
J.

public navigable highway, was not entitled to remove an obstruction to navigation caused by the formation of ice, then the riparian proprietors on either side of the Detroit river could stop navigation during winter, if they have property in the ice after it is formed; for it is common knowledge that that property is destroyed every day by the powerful steamers required to break the ice so as to keep the river open for navigation between the two shores. A similar condition exists on the river St. Clair, between Sarnia and Port Huron, and on the St. Lawrence river, between Prescott and Ogdensburg.

I do not think the case of *The People's Ice Co. v. Steamer Excelsior* (1880), 44 Mich. 229, in any way conflicts with the general rule as to the right to destroy the ice for the purpose of navigation, as that case was decided on the ground that there was a wanton destruction of an ice preserve, and not for the purposes of navigation.

There is, however, another aspect in which this case may be regarded. The Grand Trunk Railway Company are riparian owners on this bay, as well as the owners of a part of the water lot, and might at all times have kept a channel open to its wharf for those shipping ice therefrom. The passages cut in the ice by the defendants were opposite the Grand Trunk Railway wharf, and they (the defendants) were riparian owners under a lease from the Railway Company of part of its premises.

The question which arose in *Washington Ice Co. v. Shortall* (1881), 101 Ill. 46, and also in *Lorman v. Benson* (1860), 8 Mich., does not arise here, as there was no appropriation by the defendants of any ice claimed by the plaintiff. The defendants' operations were confined to cutting through the ice and so removing an obstruction to their navigating this navigable highway. I consider this course may properly be resorted to as a right of navigation.

There will be judgment for the defendants, dismissing the plaintiff's action with costs.

G. F. H.

[DIVISIONAL COURT.]

MACDONALD ET AL. V. THE CORPORATION OF THE
TOWNSHIP OF YARMOUTH.*Municipal Corporations—Tiles Placed on Side of Highway—Accident—
Negligence.*

On the side of a township road where there was a fill of about fourteen feet, with railings on either side, a quantity of tiles, of a large size, and of a light grey colour, were, shortly before the accident, piled by defendants on the side of the highway in a slight hollow behind the railing, for the purpose of repairing the culvert which ran through the fill. Some planks were thrown over them, and a board nailed between the two boards forming the railing, so as to further hide the tiles from view :—

Held, that this did not constitute evidence of negligence on the defendants part so as to render them liable for injuries sustained by the plaintiff by reason of the horse, which he was driving, becoming frightened at the tiles and running away.

THIS was an action tried before MACMAHON, J., without a jury, at St. Thomas, on the 24th November, 1897.

J. A. Robinson, for plaintiffs.

Glenn and Beckett, for defendants.

The action was brought to recover damages for injuries Statement.
sustained by the plaintiff by reason of a horse she was driving shying at some tiles, of a large size and of a light grey colour, placed on the side of the highway, and running away, and upsetting the vehicle, and throwing her out and injuring her.

Actions had previously been brought against the members of a special committee appointed to get the work done; a person who drew the tiles to the place where they were, and another person, a path master, who did work by the day; but, after lengthened litigation, the Court of Appeal finally decided that the defendants were not liable, and the actions were dismissed. This action was then brought against the township.

The evidence, set out in the report of the previous cases, *McDonald v. Dickenson*, and *Freeman v. Dickenson*

Statement. (1897), 24 A. R., 31, was, that on the side of a highway, in the defendants' township, namely, the Talbot Road, about four miles from St. Thomas, there was a fill of about fourteen feet, a railing running along each side of the fill. In the fill there was a culvert, which needed repairing, and in April, 1892, the council of the defendant township passed a resolution appointing the reeve and one of the township council a committee to rebuild the culvert. The tiles in question were required for use in the work, and they were put on the north side of the fill, at the end of the railing, for the purpose of being so used in the repairs. In addition to this evidence it was proved at the trial of the present action that the tiles, after being unloaded from the wagon on the north side of the highway at the west end of the railing, were that same afternoon moved down to a place in a slight hollow behind the railing, and some planks were thrown over them, and the path master, the person who was doing the work, nailed a board between two bars forming the railing to further hide the tiles from view.

At the close of the case the learned Judge reserved his decision, and subsequently delivered the following judgment:—

December 10th, 1897. **MACMAHON, J.**:—

This is another phase of the case of *McDonald v. Dickenson*, and *Freeman v. Dickenson* (1897), reported in 24 A. R. 31. It was sought to make the defendants in those actions liable as contractors for negligence in doing the work for the municipality; but the majority of the Court of Appeal held that they were the servants or agents of the corporation, and the action was dismissed.

Most of the material facts appear in statement set out in 24 A. R., at pp. 31, 32, and in the judgment of MacLennan, J.A., at pp. 36, 37, and it is therefore unnecessary that they should be repeated here. There was, however, evidence given at this trial which if given

at the former trial is not noticed in the report of the judgments in the Court of Appeal. This evidence shews that the tiles, after being unloaded from the wagons on the north side of the highway at the west end of the railing, were on the same afternoon moved down to and placed in a slight hollow behind the railing, and some planks thrown over them, and Dickenson, the overseer of the work, nailed a board between two boards forming the railing to further hide the tiles from view.

Judgment.
MacMahon,
J.

Even without this piece of evidence I see no grounds for holding that the defendant corporation was guilty of negligence. But with the precautions taken in the way I have indicated, I do not see what greater care the municipality could be called upon to exercise than its workmen did here. The great preponderance of the evidence, some of which was given by those skilled in the conduct of such works, was that had the tiles been deposited in the ravine in the vicinity of where the culvert was being built, they would have been much more likely to frighten horses passing along the highway than where they were placed.

I find the defendant corporation was not guilty of negligence. The action must therefore be dismissed with costs.

From this judgment the plaintiff appealed to a Divisional Court, composed of BOYD, C., and MEREDITH, J.

On February 10th, 1898, the appeal was argued.

J. A. Robinson, for the appellants.

Glenn, for the respondents.

March 1st, 1898. BOYD, C.:—

This action under most favourable circumstances might be difficult to maintain, but upon the finding of the Judge at the trial it is impossible.

The complaint is that the municipal corporation wrongfully placed and left on the side of the road some grey tiles, at which the plaintiff's horse became frightened and

Judgment. upset the conveyance, to the damage of the plaintiff's
Boyd, C. person, etc.

The facts are that the tiles were laid at the side of the travelled way, on the slope of a descending bank, some fifteen feet from the edge of the road as used. They were unloaded and placed behind the railing which guarded the road at this point, and were in part covered with planks. They were laid in the most convenient place for the work to be done with them, which was to replace or repair a culvert at the bottom of the ravine which needed attention; they were there for a short time before the work began and as preparatory to it. If laid elsewhere near by they would have been just as conspicuous as where they were and just as likely to frighten some horses that might pass that place.

It is plain that the accident happened not because the road was out of repair; and it is not proved that these tiles as placed constituted a nuisance on or near the road. On the contrary, the tiles were there for a necessary piece of work, and they were reasonably and lawfully placed for that purpose by the side of the road.

Granted that the evidence suffices to shew that some horses were frightened by them, that gives no cause of action if the object was rightfully placed and rightfully remained *in situ*. There was nothing *per se* abnormal or monstrous about these plain grey tiles, looking very much like barrels of cement. They were not in motion and they did not emit terrifying noises. They were not so provocative of alarm as the brilliant red drinking-trough set up by the authorities in Massachusetts, frightening horses with its colour, which was considered legally innocuous in *Cushing v. Inhabitants of Bedford* (1878), 175 Mass. 526. See also *Hinckley v. Inhabitants of Somerset* (1887), 145 Mass. 326.

The corporation was in the reasonable use of the road-side for the purpose of making necessary repairs, and by occupying part of it with the tiles they were not transgressing any rule of law and were not therein acting

wrongfully or negligently towards the public or any member of the public. The weight of opinion is greatly against any such cause of action as is here set forth and attempted to be proved: *Maxwell v. Corporation of Clark* (1879), 4 A. R. 460; *McDonald v. Dickenson* (1897), 24 A. R. 31; *O'Neil v. Windham* (1897), 24 A. R. 341; and *Jeffery v. St. Pancras Vestry* (1897), 63 L. J. N. S. Q. B. 618, which may be usefully compared with *Roe v. Village of Lucknow* (1893), 21 A. R. 1. And see *per* the Lord Chancellor in *Attorney-General v. Sheffield Gas Consumers Co.* (1853), 3 DeG. M. & G. 304, at p. 340.

Judgment.
Boyd, C.

The judgment should be affirmed with costs.

MEREDITH, J.:—

The acts complained of by the plaintiff were done by the defendants while engaged in the needful repair of the highway. The claim is that they performed their statutory duty of keeping the highway in repair in so negligent a manner as to cause the injuries in respect of which damages were sought.

But I am quite unable to agree in the contention that any such negligence has been proved against them.

The tiles were proper, if not necessary, material for the work being done; they were placed off the travelled part of the road, outside the guard rails with which the travelled part of the road at the place in question is on both sides fenced, and they had been there for less than twenty-four hours before the accident happened. I quite fail to see proof of actionable negligence in all or any of these acts.

The work of repairing the highway, done in a reasonably careful manner, is one of the ordinary dangers and difficulties of traffic upon highways which persons using them must take and expect. There are more or less of such difficulties and dangers which may be encountered anywhere and at any time and which occasionally do cause injury, but injury which, in the absence of actionable negligence causing it, the sufferer must put up with.

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Judgment. It has been suggested that the tiles might have been better covered, but that might not have mended matters. It might have made them the more an object likely to frighten horses. Again, it has been suggested that the defendants might have had a man at hand at the time to lead horses past the object, but I have no doubt that all but the most timid of drivers would have resented that, and have preferred to manage their own horses from the driver's seat; it would be a very unusual thing.

Meredith, J.

But, however all that may be, the onus of proof of negligence causing the injury was upon the plaintiff, and the learned trial Judge has found upon the whole evidence that the defendants were not guilty of any such negligence; and in that finding I entirely agree. If a jury had so found, their verdict would stand; so too in this case the finding of the trial Judge ought to, in my opinion, stand.

I would dismiss this motion with costs.

G. F. H.

[DIVISIONAL COURT.]

BEATTIE V. HOLMES.

Division Court—Jurisdiction—Insolvent—Transfer of Goods in Trust—Distribution amongst Creditors—Action by Assignee to Recover Creditors' Share.

Within sixty days of the making of an assignment for the benefit of creditors, the insolvent transferred to a person in trust for certain of his creditors a quantity of butter, which was sold, realizing \$1,800, and the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee then sued one of the creditors to recover back the moneys paid him as his share, the amount so sought to be recovered being within the jurisdiction of the Division Court:—

Held, that the transfer was divisible into as many parts as there were shares and the Division Court had jurisdiction to entertain the action.

Statement. THIS was an appeal from the judgment of MEREDITH, C.J., refusing an order prohibiting the plaintiff from further proceeding with the plaint in this matter in the third Division Court of the county of Huron.

The claim of the plaintiff was to recover \$13.39. The Statement.
particulars of the claim stated that the plaintiff sued "as assignee of the estate of John Hanna, of Seaforth, an insolvent debtor, for repayment by the defendant, Joseph G. Holmes, of Goderich township, of the sum of \$13.39, being the amount paid to him out of the proceeds of butter transferred on the 4th day of August, 1894, by the said John Hanna, said transfer and payment being an unjust preference, and void as against the plaintiff as such assignee as aforesaid, having been made within sixty days of the assignment for the benefit of creditors of the said John Hanna."

The insolvent had been carrying on the creamery business, and, in the spring of 1894, had obtained supplies of cream from the farmers at three different centres, among others at Holmesville. Having fallen in arrear in his payments his Holmesville patrons pressed for payment, and, in default of payment, demanded security, and by way of security the insolvent transferred to D. D. Wilson a quantity of butter, consisting of some 11,000 pounds, in trust for the Holmesville patrons. The butter was in Wilson's cold storage warehouse at Seaforth, and was immediately set aside in the warehouse in Wilson's name as such transferee. The transfer was made on the 4th of August, 1894. The butter was subsequently sold and realized \$1,800, which was distributed amongst the Holmesville patrons in proportion to the amount of their claims.

The assignment to the plaintiff was made on October 3rd, and this action was brought by the plaintiff, as such assignee, to recover the amount paid to the defendant by Wilson as his share of the proceeds of the sale of the butter.

It was objected that the Judge of the Division Court had no jurisdiction to entertain the plaint or adjudicate upon it, because, as it was contended, before the claim could be dealt with the transfer to Wilson must be first set aside, and for the purpose of dealing with that matter the whole amount of the transfer would have to be dealt with, which would be beyond the jurisdiction of the Division Court.

Statement. The trial proceeded, subject to the defendant's objection to the jurisdiction, and judgment was reserved, and was ultimately given in favour of the plaintiff, the learned Judge holding that he had jurisdiction, and determined that the transfer of the butter was a fraudulent preference within the meaning of R. S. O. ch. 147.

The defendant thereupon applied for a new trial, and his application was dismissed, the learned Judge retaining the opinion expressed by him in giving judgment after the trial.

The defendant paid the amount of the judgment debt and costs to the clerk of the Division Court, under protest as he alleged, and the amount was taken out by the plaintiff and distributed.

A motion for a prohibition was then made to MEREDITH, C.J., who delivered the following judgment.

January 24, 1898. MEREDITH, C.J. [after setting out the facts] :—

There is nothing on the face of the summons and particulars of claim to indicate that the plaintiff was putting forward a claim which the Division Court had not jurisdiction to try. It is a claim, as I read it, to recover \$13.39 which the plaintiff says, in effect, was money received by the defendant to his use.

Does then the fact that the moneys were received by the defendant, under the circumstances which I have mentioned, oust the jurisdiction of the Division Court? I think not. Section 10 of R. S. O. ch. 147, in my opinion, gives to the plaintiff, in his capacity of assignee, the right to sue for the proceeds of any property of a debtor which has passed into the hands of a person in the position of the defendant from one who has obtained from the debtor a transfer of property, if the transfer be invalid against creditors under the provisions of the Act. As applied to a transaction, such as that in question here, it provides that if the property so transferred is sold, disposed of, realized or collected by the person to whom the transfer is made,

"the money or other proceeds" may be seized or recovered in any action by any person who would be entitled to seize and recover the property had it remained in the possession or custody of the debtor, and that such right to seize and recover shall belong not only to an assignee for the general benefit of creditors, but, in case there is no such assignment, shall exist, in favour of all creditors of the debtor.

Judgment.
Meredith,
C.J.

Nothing is said about first setting aside the transfer, but the right to recover is given to any one who would be entitled to recover the property if it had remained in the possession or control of the debtor. Here, had the butter remained in the possession or control of Hanna, which I take to mean had not been transferred by him, the plaintiff could certainly have recovered it, and that being so, his assignee is by the provisions of the statute entitled to recover the money or other proceeds realized from the sale of it from the defendant to the extent, of course, to which he has been the recipient of them.

Even if ordinarily a plaintiff in the position of this plaintiff must first have the transaction which he impeaches set aside in order to reach the property transferred by his assignor, that does not seem to me to be necessary by reason of section 10 where the property has been disposed of, for by that section, where that has occurred, the assignee is given a right of action against the person who has received the proceeds, where the conditions and circumstances exist on which according to the provisions of the section the right of action is to depend.

Assuming, again, that as a matter of law, the plaintiff had no right to recover until the transfer to Wilson was set aside, was the error more than an error as to the law, not as to a matter upon which the jurisdiction of the Judge depended (for he has not assumed to declare that the transfer is fraudulent against creditors), but as to the plaintiff having a right of action, without such an adjudication having been first had?

I think too, though in the view I have taken it is not necessary to determine that point, that the Judge had jur-

Judgment. jurisdiction to determine as to the validity of the transfer as
Meredith, against the plaintiff, in order to determine whether or not
C. J. the plaintiff had a right of action against the defendant to recover what he had obtained under it out of the assets of the debtor.

This case does not differ in principle from one where the assignee sues a creditor to whom goods of the debtor have been transferred under circumstances rendering the transfer invalid as against creditors, to recover a sum within the jurisdiction of the Division Court, for the conversion of the goods, and in such a case it is, I think, beyond question that the Judge might inquire as to the validity of the transfer, and, if he found it invalid, give judgment for the plaintiff for the damages sustained by him owing to the conversion.

There was a further objection made to the application which is, I think, also fatal to it. The alleged want of jurisdiction does not appear on the face of the proceedings, and the defendant having satisfied the judgment by payment there is nothing now to prohibit: *Re Denton v. Marshall* (1863), 1 H. & C. 654; Division Court Rules 125 and 247.

Mr. McCarthy has, since the argument, referred me to the case of *Re Johnson v. Therrien* (1888), 12 P. R. 442, as an authority for the position taken by him on the argument, that the payment by the defendant of the judgment debt and costs did not preclude him from obtaining an order for prohibition if otherwise entitled to the order.

In that case, however, *Denton v. Marshall* was not referred to, and there is, I think, nothing in the passage from Fitzherbert, quoted in the judgment of the learned Chief Justice, inconsistent with the view that as was decided in *Denton v. Marshall*, where the amount of the judgment is paid over to the plaintiff there remains nothing to prohibit.

It will be observed that the garnishee in *Therrien's* case had under sec. 187 of the Division Courts Act, R. S. O. (1887) ch. 51, the right to pay the amount for which judgment had gone against him into Court, or to the primary creditor, and had elected to pay it into Court, and the Court

probably treated the payment as not being a payment to the plaintiff, which the payment in this case, having regard to the provisions of the rules, I think was; and there is also the further distinction between the cases, that the clerk has in this case actually paid over to the plaintiff a large sum on account of the moneys received from the defendant in this case, and the defendants in the other similar actions who paid the amounts recovered against them into Court.

Upon the whole, I am of opinion that the motion should be dismissed with costs.

Judgment.
Meredith,
C.J.

On the 10th day of February, 1898, before a Divisional Court composed of BOYD, C., and MEREDITH, J., *D. L. McCarthy* supported the appeal. Before the amount claimed in the Division Court could be collected, there should have been a finding setting aside the transfer to Wilson. The transfer to Wilson was not void, but voidable merely. The Division Court Judge would first have to deal with the question of the validity of the transfer, and this would involve the amount of the whole transfer, namely, the \$1,800, which was beyond the jurisdiction of the Division Court; and further, there is no machinery in the Division Court to set aside a transfer of this kind: *Meharg v. Lumbers* (1896), 23 A. R. 51; *Woods v. Reesor* (1895), 22 A. R. 57; *Meriden Britannia Co. v. Braden* (1894), 21 A. R. 352; *Re Perras v. Keefer* (1892), 22 O. R. 672. The Judge cannot give himself jurisdiction by deciding as a question of law that which would give him a jurisdiction he did not possess: *Long Point v. Anderson* (1891), 18 A. R. 408.

Aylesworth, Q.C., contra. It was not essential to first set aside the transaction by any express act of the Court. All that was necessary was that the transaction should be treated as void. This the assignee has done by bringing the action. *Meharg v. Lumbers* (1896), 23 A. R. 51, is complete authority for what is done here. There it is said that it does not require a judgment setting aside the transaction before it could be avoided, but that it is

Argument. void against a creditor who elected to avoid it; and it was held that Lumbers must pay to the assignee what he had collected under the preferential security there. There was no express judgment in that case setting aside the transaction. The transaction was void so soon as the assignee elected to treat it as void, and all that the Judge had to do was to deal with the amount before him. But even if his decision involved a consideration of the validity of the transaction, this would not be beyond the jurisdiction of the Court. In *Munsie v. McKinley* (1864), 15 C. P. 50, it was held that the Judge of the Division Court might, notwithstanding sec. 54, sub-sec. 4 of the C. S. U. C. ch. 19,—which is the same as sec. 69, sub-sec. 4 of the R. S. O. (1887) ch. 51,—entertain an interpleader application to try the question of the property in goods, even though the enquiry might involve the title to land. There is, however, nothing to prohibit here. The defendant paid the amount into the Division Court, and it has been taken out by the assignee and distributed.

McCarthy, in reply. The plaintiff understood this was a test case and paid the amount into the Court under protest; and it was not until he moved for the prohibition that he ascertained that the plaintiff would not agree to so treat the action.

March 1st, 1898. BOYD, C.:—

Upon the facts as stated in the application for prohibition, there is no ground for saying that the Division Court had not jurisdiction.

The insolvent Hanna was indebted to a large number of people—seventy-five or so—for cream supplied to him through the early part of the year 1894, and in August of that year he transferred a quantity of butter to one Wilson, a warehouseman, to hold in trust for the satisfaction of these creditors. The butter was sold in September for \$1,800, and the proceeds distributed by Wilson among the creditors according to their proportions prior to the

assignment for creditors made under the statute by Hanna on 2nd October, 1894. This transfer of butter to Wilson as trustee for the seventy-five was within sixty days of the assignment, and the plaintiff as assignee has elected to avoid the transfer as to each of the creditors who had received his part of the proceeds of the butter.

Judgment.
Boyd, C.

It is manifest that the transfer is divisible into as many parts as there are creditors. There was no dealing with Wilson except as a conduit through whom the butter might be turned into money and paid over to the beneficiaries. Each creditor might have the means of defending the payment made to him by shewing such a state of facts or dealings as between him and the debtor as would rebut the presumption of fraud or preference created by the statute. But this would be the right of each creditor for himself and one payment might be protested and another not. There is no common ground of defence suggested by which the transfer as a whole is to be supported, and therefore there was no enquiry before the Division Court as to any matter not within the competence of that jurisdiction, for the amount paid to each was well within \$100. It is not necessary to consider what might be the result if the transfer as a whole had to be set aside.

The order is affirmed with costs.

MEREDITH, J.:—

The fallacy of the appellant's contention lies in this, that he treats the impeached transaction as valid until set aside by a judgment of the Court, whereas it was always invalid as against a creditor choosing to treat it as invalid against him. The invalidity arises not from the judgment of the Court, but from the Act which makes the transaction invalid. The Court merely decides whether the plaintiff is a person who can treat it as invalid and whether it is a case within the provisions of the enactment. The Court neither makes nor unmakes a contract, it decides upon its existence or non-existence, validity or invalidity.

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Judgment. The assignee sues for money, which, if the transaction is invalid, he is entitled to recover; other persons against whom he may have like rights as to other moneys or goods are not necessary parties to that action. The question is one between him and the person who has the money or goods. That person asserts a right to the money or title to the goods under the impeached transaction; he has no other right or title to it; and the Court has to determine merely whether, as against the plaintiff, that transaction was a valid one, a question which the Division Court always had power to determine, the amount claimed being within its jurisdiction.

To give effect to the appellant's contention would be to hold that Courts of common law never had any jurisdiction to determine whether a transaction attacked under the statute of Elizabeth was valid or not, that the transaction must first be set aside in a Court of Equity.

The Division Court plainly had, in my judgment, jurisdiction in the action for these reasons, as well as because the application is made too late, and for the reasons given by the Chancellor; therefore the appeal should be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

SAUNDERS V. THE CORPORATION OF THE CITY OF TORONTO.

*Municipal Corporations—Carters Employed to Remove Street Sweepings—
Master and Servant—Negligence—Liability.*

The relationship of master and servant exists between a city corporation and a licensed carter owning his own horse and cart, who, paid by the hour by the city, is hired by and is under the direction of their street foreman for the purpose of removing street sweepings; and the city may be liable for an injury caused by the negligence of the carter while so occupied in their employment.

THIS was an action tried before MACMAHON, J., and a **Statement** jury, at Toronto, on the 24th January, 1898.

E. F. B. Johnston, Q.C., and Gash, for the plaintiff.

Fullerton, Q.C., for the defendants.

The action was brought by the plaintiff against the corporation of the city of Toronto, to recover damages for an injury sustained by him while riding a bicycle along Bathurst street, in the said city, by being run down by a horse and cart driven by a man named McGowan, who was removing street sweepings. McGowan was a carter, licensed under one of the city by-laws, and owned the horse and cart he was driving. The street foreman in his evidence said that the only orders he gave the man were as to where he was to get the stuff, and where he was to dump it, that he was to go and return by the shortest route, and that if he did not do so he would be discharged. The stuff was cleaned up and placed in piles on the side of the road by other men. McGowan was occasionally hired in the spring and fall when this work was required to be done, and had been at work off and on during the spring season of 1897, and for two weeks constantly prior to this accident at this particular season, and had been so employed during the past three years for which he was paid by the city.

Statement.

The work was done under a by-law of the city, No. 2464, sec. 22, which provided that the "committee may provide for the public purposes of the city such scavenger carts as they may deem necessary, and each cart shall be supplied with one horse and the necessary appurtenances, and be controlled by one man, and the men and carts will be under the charge of the officers of the department whose duty it is to see to the cleaning of the lanes and streets of the city."

The learned Judge was of the opinion that the relationship of master and servant did not arise between the carter and the city; that he was in the same position as a job master who has a horse and cart, or horses and carts of his own, and does work by the hour or day; as in the case of a warehouseman, the fact of his foreman seeing that goods to be sent away are loaded in the cart, and giving directions to have them taken to the railway station, would not render the warehouseman liable, nor would the owner of a trunk be liable when he employs a carter to carry the trunk to the station: that the case came within *Quarman v. Burnett* (1840), 6 M. & W. 499, and *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, and he dismissed the action.

From this judgment the plaintiff appealed to a Divisional Court composed of BOYD, C., and MEREDITH, J.

On February 12th, 1898, *Gash*, supported the appeal. McGowan, the carter in question, was a servant for whom the city was liable upon the principle of "*respondeat superior*," and the relationship of master and servant existed, as he was hired and paid by the city, through the foreman of the work, and was required to devote his time exclusively to this work during his employment; and was further subject to orders of foremen so far as practicable, and to dismissal for disobedience. The fact that this carter owned his own horse and cart, makes no more difference than if the city had hired a labourer who

used his own tools and in so doing had caused injury. The cases of *Quarman v. Burnett* (1840), 6 M. & W. 499, and *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, on which the learned trial Judge relied, are clearly distinguishable. In both these cases there were three persons involved, the owner of the horses, the driver, and the owner of the carriage, and the question was, whose servant was the driver who caused the mischief; and the defendants were held not liable upon the ground that the driver was not their servant but that of the job-master. There the driver was only the subject of the contract, and not a party to it, being hired out along with the horses by the job-master at so much for the outfit: *Sadler v. Henlock* (1855), 4 E. & B. 570; *McKeon v. Bolton* (1851), 1 Ir. C. L. Rep. 377; *Bush v. Steinman* (1799), 1 B. & P. 404; *Brackett v. Lubke* (1862), 4 Allen 138; also *Chilcot v. Bromley* (1806), 12 Ves. 114; Addison on Torts, 7th ed., p. 98; and Morrill on City Negligence, p. 98. Even if the carter hired were not a servant and could be termed an "independent contractor," still the city would be liable from the evidence of directions and control, and, especially, when engaged in cleaning or repairing their own streets: *Burgess v. Gray* (1845), 1 C. B. 578; *Blake v. Thirst* (1863), 2 H. & C. 20, 32 L. J. N. S. Ex. 188; *Randleson v. Murray* (1838), 8 Ad. & E. 109; *Linnehan v. Rollins* (1884), 137 Mass. 123.

Fullerton, Q. C., contra. The cases of *Quarman v. Burnett* and *Jones v. Corporation of Liverpool* apply, and are decisive of the present case. The carter in question was in the same position as an expressman or a hackman who may be engaged for a specific job, or by the hour or day in the ordinary course of their business without rendering the hirer thereby liable for any damage caused by them; and this man was in fact a duly licensed carter, and carried on an independent employment, and there was no sufficient evidence of interference or control by the foreman to render the city liable. By-law No. 2464, section 22, of the city by-laws, applies only to the horses and carts which the city had purchased to provide for this work.

Argument.

Argument. *Gash*, in reply. There is no evidence that McGowan was a licensed carter at the time of the accident, and it would make no difference if he were such, as there are numerous cases where parties have been held liable for the negligent conduct of licensed engineers, pilots, etc., upon the principle of master and servant.

March 1st, 1898. BOYD, C. :—

The right of action in this case “depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has the right at the moment to control the doing of the act”: *per* Bowen, L.J., in *Donovan v. Laing*, [1893] 1 Q. B. 633.

Here, the carter was hired with his horse and cart to do work for the city in cleaning the streets. He was to convey refuse matter collected in heaps from the streets to some dumping-place as required and directed by the officer in charge of the street cleaning department. He was paid at the rate of twenty-eight cents an hour, and worked usually nine hours a day. He was *pro tanto* the servant of the corporation, and, if not, whose servant was he? Whose orders was he to obey except those of the person in charge of the streets? The engagement was entirely that of servant and not of contractor: *Sadler v. Henlock* (1855), 4 E. & B. 570; and the fact of the carter being one under license makes no difference: *Martin v. Temperley* (1843), 4 Q. B. 298, 312.

The cases relied on of *Quarman v. Burnett* (1840), 6 M. & W. 499, and *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, are quite distinguishable, for there the relation of three parties had to be ascertained: (1) the servant, (2) the one who lends or hires him out, and (3) the person for whom the work is being done. The servant who causes the injury may be servant of either, and the difficulty is

to ascertain whose servant he is at the time. But here is no such dilemma. The carter can be the servant of no other than the defendants, and they from such relationship may be liable for his acts. But for this purpose the case will have to be tried out fully. There must be a new trial, with costs in the cause.

Judgment.
Boyd, C.

MEREDITH, J.:—

The sole question for consideration is whether there was any evidence to go to the jury of a relationship of master and servant between the defendants and the driver. The alleged liability of the defendants is based upon the principle that *qui fecit per alium fecit per se*, and the plaintiff must have given some reasonable evidence of the agency of the driver, otherwise the case was properly withdrawn from the jury, and judgment rightly directed against them.

But there was evidence that the defendants had hired the driver and his horse and waggon to work, with their own horses and waggons, for them in the ordinary occupation of street cleaning, paying him therefor at the rate of twenty-eight cents per hour; and it was whilst engaged in such work that the plaintiff was injured through, as he alleges, the driver's negligence.

The driver's position was, therefore, that of a servant of the defendants, or that of what has been called an "independent contractor," no other position has been suggested.

Why may it not be rightly found that it was that of a servant? He was employed and paid by the defendants, and was, it might rightly be found, under their direction and control in all things pertaining to the work he was hired to do. It surely can make no difference that he used and was paid for the use of the tools and implements of his occupation in the work he was hired to do. So might, and often do, the ordinary day labourers; and so, too, skilled labourers. In what sense can it be said that he had a contract, other than the contract of service, in that which

Judgment. he was hired to do? The jury would be by no means bound to accept entirely the foreman's notions of the defendants' control over the workman.

Meredith, J.

I see nothing in the case of *Quarman v. Burnett* (1840), 6 M. & W. 499, or in that of *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, justifying the judgment in question. In each case the driver was the servant of another person, who, rather than the defendants, was considered answerable for the consequences of his negligence.

In *Sadler v. Henlock* (1855), 4 E. & B. 570, the defendant had employed a workman to clean out a drain, and had paid him so much for the job, and yet the defendant was held liable for the consequences of his negligence in doing the work, because it was considered that the relationship of master and servant and not of "contractor and contractee" existed between them. See also *Donovan v. Lang*, [1893] 1 Q. B. 629.

The question is one of fact, though one sometimes for the Court and not for the jury, the facts being all one way, or depending upon the proper construction of writings.

Here there was, in my opinion, abundant evidence upon which the defendants might be rightly found answerable for the negligence of the driver within the scope of his employment.

There should be a new trial, costs in the action.

G. F. H.

[DIVISIONAL COURT.]

HAIGHT V. THE HAMILTON STREET RAILWAY COMPANY.

Street Railways—Accident—Negligence—Infirm Persons.

It is the duty of a motorman in charge of an electric car on a street railway to take special care to have the car sufficiently under control to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly evident and who may be crossing the line of railway at a street crossing.

THIS was an appeal from the County Court of the county of Wentworth. Statement.

The action was brought against the Hamilton Street Railway Company, to recover damages sustained by the plaintiff for an injury which happened to him by reason of his being run into by one of the defendants' motor cars.

The plaintiff was an old man, ninety-two years of age, lame, very infirm, nearly blind and almost deaf. On the 19th of July, 1897, between ten and eleven o'clock in the morning the plaintiff was in the act of crossing James street, at its intersection with Ferrie street, in the city of Hamilton, from the easterly to the westerly side of the street, when one of the defendants' cars coming from the north as it reached the south boundary of Ferrie street, ran into and injured him. There was evidence given on behalf of the plaintiff which shewed that by his actions and conduct it was reasonably clear that he was not in the possession of all his faculties, and was unable to cross any faster than he was attempting to do, and that this should have been apparent to the motorman; and it was contended for these reasons that he should have stopped the car before reaching the plaintiff, and thus have avoided running into him.

On the part of the defence evidence was given by the motorman that he saw the plaintiff about a third of a block away, and that he seemed to hesitate in crossing, and

Statement. looked towards the car which the witness thought plaintiff saw, and that plaintiff then started to cross; witness tried to stop the car, and shouted and rang the bell: he also stated that he might have stopped the car before reaching the north side of Ferrie street had he thought there was any danger.

There was other evidence that the plaintiff had hesitated in attempting to cross, going back two or three times, that the car was going slowly, and that the gong was sounded, although there was a conflict of evidence as to when it was sounded.

The jury found in answer to questions submitted to them that there was negligence on the part of the defendants; and that there was no contributory negligence on the part of the plaintiff and judgment was entered for him.

From this judgment the defendants appealed to a Divisional Court composed of BOYD, C., and MEREDITH, J. On February 10th, 1898, the appeal was argued.

Crerar, Q. C., and P. D. Crerar, for the appellants.

G. Lynch-Staunton, contra.

March 3rd, 1898. BOYD, C.:—

There is no objection to the charge of the learned County Judge, and, so far as the verdict for the plaintiff is concerned, there is ample evidence to sustain it. The whole case was peculiarly for the jury, and the charge very fairly and fully sets forth all the instruction and direction that was needed. An old man over ninety is hurt by a passing electric car at a street crossing. He was lame, hard of hearing, with imperfect eyesight, and was moving at a snail's pace over the cross-walk where Ferrie street intersects James street on which the tracks are laid. Persons who saw him thought he was in danger from the approaching car, and tried ineffectually to warn or intercept him. The motorman was also warned to look out for the old man by a shout from a baker who drove his cart between the car and the plaintiff a little before the accident.

The evidence would shew that the driver had not his car sufficiently under control at this crossing. He saw the old man : but, according to the weight of evidence, he did not begin to sound his bell till some sixty feet off at the north crossing of Ferrie street, when the old man was some six or eight feet from the eastern track, and he was not able to slow up in time to save collision. The car was going at the rate of six miles an hour, and began to slow up when half way across Ferrie street. The movements of the plaintiff were strange and noticeable, walking very slowly, straight on in a stooping position, and suggesting to the motorman (as he says) that he might be drunk (though this is hardly a satisfactory explanation).

Judgment.
Boyd, C.

Now the plaintiff though old and of failing faculties had the right to use the street and to cross it. He was moving on as fast as his infirmities permitted, and his condition of apparent unconsciousness was evidently such as to call upon the motorman to use special care in controlling the power lest harm should result to the foot passenger.

As said by a very eminent Judge in one of the first cases growing out of the use of street cars, "all foot passengers, including aged persons, women and children, have an equal right to cross the streets ; and all drivers of teams and carriages are bound to respect their rights and regulate their own speed and movements in such a manner as not to violate the rights of such passengers" : Shaw, C.J., in *Commonwealth v. Temple* (1859), 14 Gray (Mass.) 69, 75 ; and this was adhered to as the true principle in one of the latest cases in a Court perhaps of highest authority in any of the American States : *Driscoll v. West End Street R. W. Co.* (1893), 159 Mass. 142, 146.

Cases similar to the present of injuries on the highway to old people are *Robbins v. Springfield Street R. W. Co.* (1895), 165 Mass. 30 ; *Clerk v. Petrie* (1879), 6 Court of Sess. Cas., 4th series (Rettie) 1076 ; and *Smith v. Browne* (1891), L. R. 28 Ir. 1. See also *Ruddy v. London and South-Western R. W. Co.* (1892), 8 Times L. R. 658.

The appeal is dismissed with costs.

Judgment. MEREDITH, J. :—

Meredith, J.

It could not rightly have been ruled either at the close of the plaintiff's case, or after all the evidence was in, that there was no evidence upon which a reasonable jury could find for the plaintiff, and so the case had to go to the jury, and their verdict ought to stand.

At the close of the plaintiff's case it could not have been rightly said that there was no evidence to go to the jury of negligence of the defendants causing the plaintiff's injury, because there was conflicting testimony as to the sounding of the gong, and as to the speed of, and manner of running the car when approaching and at the public highway, having regard to the plaintiff's position there, and his somewhat helpless condition which was sworn to have been evident to persons at a very considerable distance from him; and even if it had plainly appeared that the plaintiff's conduct contributed to his injury so that it might rightly be said there was no reasonable evidence to the contrary, yet the case must have gone to the jury on the question, whether, notwithstanding such conduct, the defendant might by the exercise of ordinary care have avoided injuring him, there being quite enough in the facts sworn to by the plaintiff's witnesses to have required the jury to pass upon that question.

At the close of the defence the case against the defendants, upon the last mentioned question of fact, was considerably strengthened by the testimony of the driver of the car, so that the motion for a nonsuit, as it is yet called, could not properly have prevailed at either stage of the case; and the like motion now made must likewise fail.

The case seems to me a plain one; the appeal should be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

SMITH V. HAYES.

Negligence—Machine—Proximity to Highway—Infant of Tender Years—Allurement—Knowledge of Defendant—Trespasser—R. S. O. (1887) ch. 211.

Plaintiff, a child of five years of age, was injured by a horse-power used by the defendant to hoist grain into his warehouse. The machine was on a lot unfenced on one side, leased by him, adjoining his warehouse, about thirty feet from the highway, and was in charge of a man who was temporarily absent for a few minutes at the time of the accident. There was no evidence that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, nor was there any evidence of any knowledge in the defendant that children were in the habit of frequenting the place or of any intention on his part to injure :—

Held, that as the plaintiff had no right to be where he received the injury he could not recover :—

Held, also, that the omission of the defendant to comply with the provisions of the Act requiring threshing and certain other machines to be guarded (R. S. O. 1887 ch. 211) did not give a cause of action to the plaintiff.

Finlay v. Miscampbell (1890), 20 O. R. 29, followed.

THIS was a motion by the plaintiff to set aside a Statement. nonsuit, and for a new trial in an action brought by Herbert Smith, an infant, by W. R. Smith, his next friend, against William Hayes, upon the ground that the evidence at the trial disclosed actionable negligence on the part of the defendant entitling the plaintiff to have his case submitted to the jury : that the horse-power in question was not properly guarded, and that it had been negligently set on an unenclosed common contiguous to a public highway so as to be an attraction and an invitation to children to approach and examine it, and on the occasion of the accident the horse had been left unattended, which was the cause of the accident.

The action was tried at the Woodstock Assizes, on September 20th, 1897, before MEREDITH, J., and a jury.

E. Meredith, Q.C., and *Thomas Wells*, for the plaintiff.

J. B. Jackson, for the defendant.

Statement.

The evidence shewed that the defendant was using a horse-power to hoist grain into his warehouse, and had placed it on a lot, leased to him, alongside his warehouse, and although the lot was unenclosed on one side the machine was some thirty feet distant from the highway, and the plaintiff, a child of five years of age, had, during the absence of the driver, been hurt by it.

The rest of the facts sufficiently appear in the judgments in the Divisional Court.

At the close of the evidence defendant's counsel moved for a nonsuit, and the following judgment was delivered:—

MEREDITH, J.:—

I feel constrained to give effect to the defendant's objection that the plaintiff has not made out a case entitling him to go to the jury.

In cases of this character it is obviously the first thing in the plaintiff's case to shew a duty, a legal obligation, due from the defendant to the plaintiff, which has been violated.

I fail to see how it can be rightly said that there was any duty devolving upon the defendant which he owed to the plaintiff in respect of that which is complained of.

The machinery in question, whether dangerous or not, was upon the plaintiff's own property far removed from the highway. It is true the property was not enclosed. But it just seems to come to this, that unless I can say the defendant owed to this plaintiff and to all others the duty to fence that unenclosed property against him and them no action lies.

I cannot see how it was his duty to enclose this property—why he could not use it, if he saw fit, unenclosed—and the mere placing of this piece of machinery, assuming it to have been dangerous, assuming it to have been worked in contravention of the statute, R. S. O. 1887 ch. 211, did not, as far as I can at present see, put upon the defendant the duty which otherwise he did not owe.

A very different case would have been made out if it had been shewn that persons were in the habit of going to this machinery to the knowledge of the defendant and without his objection. Judgment.
Meredith, J.

There is not a tittle of evidence to go to the jury of that, and therefore I feel constrained, as I said at first, to give effect to this, which is practically a motion for a nonsuit.

The action must, therefore, be dismissed with costs.

Proceedings may be stayed, if the plaintiff desire it, until he shall have an opportunity of moving against my judgment.

From this judgment the plaintiff appealed and moved to set aside the nonsuit and for a new trial, and the motion was argued on December 16th, 1897, before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ.

Aylesworth, Q.C., for the appeal. The evidence shews that the machine was on an unenclosed lot which was near a highway and was used as a short cut to a railway station, that the defendant was guilty of negligence in leaving the horse unattended, and that the machinery was not properly protected under the statute, R. S. O. 1887 ch. 211, there being no board platform to cover the gearing as the law requires, and a breach of a statutory duty is evidence of negligence. Even if the machine was thirty feet away from the highway, that was not far enough. Twenty-five yards was considered a reasonable distance to make a statutory limit in 5 & 6 Wm. IV. ch. 50, sec. 70 (Imp.). The defendant was guilty of negligence in leaving the horse unattended: *Carroll v. Freeman* (1893), 23 O. R. 283. Even a trespasser is entitled to recover in a case like this, and a child is in a better position than an adult: *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Bird v. Holbrook* (1828), 4 Bing. 628. The trial Judge was in error when he held there was no duty to the plaintiff, in the view that the machine was not on or near the highway. It is true the

Argument. plaintiff in *Mangun v. Atterton* (1866), L. R. 1 Ex. 239, was held not entitled to succeed, but that case was much discussed by Chief Justice Cockburn in *Clark v. Chambers* (1878), 3 Q. B. D., at p. 338. I refer also to *Ilott v. Wilkes* (1820), 3 B. & Ald. 304; *Fenna v. Clare* (1895), L. R. 1 Q. B. 199; *Dixon v. Bell* (1816), 5 M. & S. 198; *Barnes v. Ward* (1850), 9 C. B. 392; *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731.

J. B. Jackson, contra. The evidence did not establish that the lot was used as a path or short cut. The plaintiff was a trespasser, and there was no duty on the defendant to fence, and so no duty to keep trespassers off the lot: *Bolch v. Smith* (1862), 7 H. & N. 736. *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731, was a similar case to this, but the danger here was farther away from the highway, and that case was followed in *Ponting v. Noakes*, [1894] 2 Q. B. 281. The true test is laid down in *Deane v. Clayton* (1817), 7 Taunt. 489, and is, had the person or animal injured a right to be there? The cases cited on behalf of the plaintiff were cases of invitation. There was no invitation here nor any knowledge by the defendant that children came near the machine. The evidence does not shew any want of compliance with R. S. O. 1887 ch. 211; but if it did the plaintiff has no right of action under that statute. The remedy is by prosecution before a magistrate and not otherwise and not by any civil remedy. See *Atkinson v. The Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; *Logan v. Hurlburt*, 23 A. R. 628, per Burton, J. A., at p. 655, per Osler, J. A., at p. 660, per Hagarty, C. J. O., at p. 665; *Birge v. Gardner* (1849), 19 Conn. 507.

Aylesworth, Q. C., in reply, referred to *Lygo v. Newbold* (1854), 9 Exch. 302.

February 14th, 1898. MEREDITH, C. J. :—

Appeal by the plaintiff from the ruling of Meredith, J., at the trial before him with a jury at Woodstock on the 20th January, 1897, that the plaintiff had made out no

case to go to the jury, and the judgment thereupon pronounced by him dismissing the action.

Judgment.
Meredith,
C.J.

The plaintiff, a child of five years of age, sues to recover damages for injuries sustained by him resulting, as he alleges, from the negligence of the defendant.

The facts appearing in evidence were that the defendant was the owner of a building used as a grain warehouse, and by the permission of the owner of an adjoining vacant lot had the use of it, and upon it was a horse-power operated by means of a horse, and used for the purpose of elevating grain in the defendant's building; the horse-power was not provided with such protection as is required by R. S. O. 1887 ch. 211, in the cases to which that Act applies, and there was perhaps some evidence that at the time when the accident to the plaintiff happened there was no one directing the movements of the horse or superintending the operations of the horse-power. The lot on which the horse-power was was unenclosed and the horse-power was placed at the distance of about thirty feet from the highway on which the lot fronted; there was some, though slight, evidence that the lot was used by the public as a short cut to a neighbouring railway station, but there was not more than a scintilla of evidence even if that, that young children were in the habit of resorting to the neighbourhood of the horse-power or that it operated as a temptation to allure young children to it, and no evidence whatever that the plaintiff had any knowledge of such being, if it were, the fact; how the plaintiff and his two companions, boys seven years of age, got to the place where the horse-power was or exactly in what way the accident happened did not appear in evidence, though there was evidence that the plaintiff had climbed upon the horse-power and evidence from which it might be inferred that his foot was crushed by the machinery at the point where the pole to which the horse was attached went through one of the slots of the machine.

In cases such as this there is a preliminary question, which must be answered in favour of the plaintiff to

Judgment. entitle him to have the case submitted to the jury, and is
Meredith, to be decided by the Judge.
C.J.

That question is stated in the English cases to be : whether on the evidence adduced negligence can be legitimately inferred : *The Directors of the Metropolitan R. W. Co. v. Jackson* (1877), 3 App. Cas. at p. 200, or as put by Mr. Justice Hunt in delivering the judgment of the Supreme Court of the United States, in *Railroad Co. v. Stout*, 17 Wallace, at p. 661 : whether upon any construction which the jury are authorized to put upon the evidence, or by any inferences they are authorized to draw from it, the conclusion of negligence can be justified, and if that question be properly answered in the negative the Judge ought to withdraw the case from the jury.

The plaintiff's right to recover depends on his having established that the defendant was negligent in the care or management of the horse-power, that his negligence resulted in causing the injury which the plaintiff sustained, and that the defendant owed a duty to the plaintiff not to be negligent.

The horse-power was in itself not a dangerous machine ; it was being used by the defendant for the purposes of his ordinary and lawful business, and upon his own land, where the plaintiff had not strictly a legal right to go unless invited there ; the horse-power was not being used so near to the public highway as to render the defendant liable for creating a nuisance to the highway by using it there, and if the plaintiff is to be treated as a trespasser and the same rule of law is to be applied in his case as if he were an adult, it was not and it could not be contended that this action can be maintained.

It is argued, however, that the plaintiff is not to be treated as a trespasser, and that he is rather in the position of one who has been invited by the defendant to go upon his lands, and that the horse-power, as to him, must be treated as a hidden danger or trap, as he was not of such an age as to be capable of appreciating the danger which he incurred by meddling with it when being in motion it might become a source of danger to him.

Had it been shewn that young children had, to the knowledge of the defendant, been accustomed to play upon the vacant lot, and that the horse-power was something that would be likely to attract them to it in their play, the case of *Keffe v. Milwaukee and St. Paul R. W. Co.* (1875), 21 Minn. 207, is a decision of the Supreme Court of Minnesota, which supports the contention of the plaintiff's counsel and would entitle the plaintiff to recover if that case was rightly decided.

Judgment.
Meredith,
C.J.

The machinery by which the plaintiff in that case was injured was a revolving turn-table, which the defendants, a railway company, had built upon their own land; the land and the turn-table were unenclosed and unguarded, and the turn-table might readily have been fastened so as to prevent it being moved by children, though unfastened as it was it could be easily turned around by a child, and children were, to the knowledge of the defendants, in the habit of playing upon the turn-table and turning it around.

To the argument that the defendant was a trespasser and that the defendants owed no duty to him, it was answered by the Court, at p. 210: "To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-table by the

Judgment.
Meredith,
C.J.

defendant's own conduct, and that, as to him, the turn-table was a hidden danger, a trap:" and Mr. Justice Young, who delivered the judgment of the Court, went on to say, at p. 211, that what to an adult would be an express invitation, the temptation of an attractive plaything is to a child of tender years, and having pointed out that had the defendant left the "turn-table unfastened *for the purpose* of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass," he then proceeds as follows: "It is true that the defendant did not leave the turn-table unfastened *for the purpose* of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children, that it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and, when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

Among other cases, English and American, which are commented on, *Lynch v. Nurdin* (1841), 1 Q. B. 29, is referred to as fully sustaining the position of the Court, and it is there said that the authority of that case is not weakened by the Court having assumed instead of proving that the defendant owed to a young child under the circumstances of that case a duty which he would not owe to an ordinary trespasser for whose trespass he was not in any way responsible.

Judgment.
Meredith,
C.J.

Hughes v. Macfie (1863), 2 H. & C. 744, and *Mangan v. Atterton* (1866), L. R. 1 Ex. 239, are distinguished, because, it is said, there was nothing to shew that the defendants knew or had reason to apprehend that the cellar lid, in the one case, or the crushing machine, in the other, would be likely to attract young children into danger.

This decision was given on appeal from a judgment pronounced by the Court below in favour of the defendants on a motion by the defendants for judgment on the pleadings; the judgment of the Court below being delivered by Mr. Justice Hall, a full report of which will be found in 2 Central Law Journal, at p. 172 *et seq.*

The law is laid down in substantially the same way by Mr. Justice Dillon, in *Stout v. Sioux City & Pacific R. R. Co.* (1872), 2 Dillon 294 (U. S. Cir.), and by the Supreme Court of the United States on appeal in the same case, *sub nom. Railroad Co. v. Stout* (1873), 17 Wallace 657; that was also a case of injury from a turn-table in circumstances very similar to those which existed in the *Keffe* case.

In *Koleti v. Minneapolis & St. Louis R. W. Co.* (1884), 32 Minn. 133, the rule laid down in the *Keffe* case is referred to and it is evident from the judgment of Chief Justice Gilfillan that the Court was of opinion that the doctrines invoked to support it had been pushed to their utmost limit.

The rule was again under consideration by the Supreme Court of Minnesota in 1886 (*Emerson v. Peteler*, 35 Minn. 481), but the Court refused to apply it to a case where a

Judgment.
Meredith,
C.J.

contractor who was employed in grading a public street under a contract with the municipal authorities of a city and in the lawful occupation of the street for that purpose was engaged in transporting earth by the means of cars which were moving along it slowly and were dangerous only to persons attempting to ride upon them or accidentally falling upon the track in front of the wheels, was sought to be made liable for injuries which a child of five years had sustained by jumping or falling from the bumper of one of the cars upon which he had climbed, and it was held that there was no duty upon the contractor, as it was argued there was, "to provide better police supervision of the movement of the cars in order to prevent children from boarding them when under the temptation" to climb upon them.

Before the same Court, in 1888 (*Twist v. Winona & St. Peter R. R. Co.*, 39 Minn. 164), the rule was again under consideration, and the opinion was expressed that it required to be properly qualified and limited in its application, presumably as indicated by Mr. Justice Mitchell, at p. 167, in the following passage: "Properly qualified, and limited in its application, the doctrine of the *Keffe* case is, in our judgment, in accordance with both reason and the dictates of humanity. But some of the cases have undoubtedly gone too far. By adopting an extreme or extraordinary standard of duty on the part of the land-owner on the one side, and on the other side by attributing the conduct of all children to their childish instincts so as to exempt them from the charge of contributory negligence, regardless of age or mental capacity, it is obvious that the rule of the *Keffe* and similar cases is capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of

property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. This Court itself, if it has not modified the *Keffe* case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application. *Kolsti v. Minneapolis & St. Louis Ry. Co.* (1884), 32 Minn. 133 (19 N. W. Rep. 655); *Emerson v. Peteler* (1886), 35 Minn. 481 (29 N. W. Rep. 311)."

Judgment.
Meredith,
C.J.

The Supreme Court of Missouri held in *Schmidt v. Kansas City Distilling Co.* (1886), 90 Mo. 284, which was an action for the death of a child by falling into an unfenced pool of hot water discharged on the defendants' distillery premises sixty feet from the highway and 225 feet from any house, that the action could not be maintained without proof that the place was attractive to children or that to the defendants' knowledge they resorted there for amusement.

On rehearing the plaintiff was granted a new trial, as on an amended petition, alleging facts to shew that the place where the child was injured was attractive to children, or that to the knowledge of the defendant, children were in the habit of resorting to it for amusement, or otherwise he might establish a liability on the part of the defendant.

The test of liability adopted in these cases has been recognized as the true test by the Courts of many other States of the Union, but it would serve no good purpose to refer in detail to the cases. It will be sufficient to refer to three recent ones: *Bransom v. Labrot* (1884), 81 Ky. 638; *Penso v. McCormick* (1890), 125 Ind. 116; *Iluaco Railway & Navigation Co. v. Hedrick*, (1890) 1 Wash. 446, 22 Am. St. Rep. 169, and to the elaborate note of the reporter to the case of *Schmidt v. Kansas City Distilling Co.*, as reported in 59 Am. Reports, at p. 23, *et seq.*, where many of the authorities, both those which recognize and those which reject the test of liability adopted

Judgment. in the *Keffe* case are cited. Among the latter I refer to
Meredith, *Frost v. Eastern Railroad* (1886), 64 N. H. 220 for a
C.J. vigorous argument for the opposing view.

Mr. Beven, in his work on Negligence, 2nd ed., p. 188, approves of the view taken by the Supreme Court of Missouri in the *Schmidt* case, which he states as follows : " An owner of property must not place temptation upon it to allure any one to a dangerous place upon his premises, nor yet place dangerous things so near to a public street or highway as to endanger persons thereon ; and the fact that young children are in the habit of resorting to the neighbourhood is an element in determining what is alluring, and what safeguards should be adopted," and he refers to *Jewson v. Gatti* (1886), 2 Times L. R. 381, 441, as a case in which this doctrine is approved by the Court of Appeal. He then points out that, though this is a sound principle, there is often difficulty in its application ; referring to *Klix v. Nieman* (1887), 60 Am. Rep. 854, where the Court negatived any duty to fence a pond which was unfenced and found to be dangerous to the lives of children living in the neighbourhood and who might be attracted to it for amusement or otherwise, and suggests as a possible principle that the duty to children and adults is substantially the same, only that in the case of children, trespassers allured by some attraction are allowed wider limits of deviation than in the case of adults (pp. 189-190).

Whether the view adopted by the Supreme Court of the United States and the other American Courts whose decisions agree with it is in accord with English law may be open to question.

In *Lynch v. Nurdin*, the cart, the moving of which caused the injury, was left unattended upon a public highway, where the plaintiff had a right to be, and he was a trespasser only by getting into the cart, where he had no right to go ; and the case was not in this respect like the *Keffe* case, where the plaintiff (apart from the question of his being allured there by the attraction which it afforded to him) had no right to be where he was, and the only trespass

by the plaintiff in *Lynch v. Nurdin*, was in meddling with something which he had no right to interfere with, but was excused for doing so by reason of his tender years. *Lynch v. Nurdin* was doubted by Chief Baron Pollock in *Lygo v. Newbold* (1854), 9 Exch. at p. 305, and is spoken of in terms of disapproval by Lord Esher in *Mann v. Ward* (1892), 8 Times L. R. 699 ; and *Mangan v. Atterton*, and *Hughes v. Macfie*, seem to me to be inconsistent with it.

Judgment.
Meredith,
C.J.

Mangan v. Atterton in turn is doubted by the Court of Appeal in *Clark v. Chambers* (1878), 3 Q. B. D., at p. 339, as to one ground of the decision, namely, that there was no right to recover because the injury was caused by the act of the boy who turned the handle, and by the plaintiff himself, who was a trespasser, and was said in this respect to be obviously in conflict with other authorities ; and as to the other ground, that there was no negligence on the part of the defendant, or that the negligence was too remote, it was expressly dissented from, the Lord Chief Justice (Cockburn) saying : " It appears to us that a man who leaves in a public place, along which persons and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

Lord Justice Rigby in *Engelhart v. Farrant & Co.*, [1897] 1 Q. B., at p. 247, refers to *Lynch v. Nurdin* as an authority for the proposition that it is not the law " that wherever between the negligence of a servant and the incident the act of some third person intervenes and is the proximate cause of the injury the employer is not liable."

In *Fenna v. Clare*, [1895] 1 Q. B. 199, no reference is made to *Lynch v. Nurdin*, and it seems to have been assumed that had the plaintiff received her injuries in climbing upon the wall she would not have been entitled

Judgment.
Meredith,
C.J.

to recover, though the wall, owing to the spikes upon it and its proximity to the highway, was dangerous to persons using the highway and who in falling might come in contact with the spikes.

Jewson v. Gatti, already referred to, was also a case where the child who was injured was upon the highway; the defendant was the occupier of a cellar in Maiden Lane and his workmen were engaged in scene painting there; the area over the cellar was open and there was a protecting bar around the opening; the plaintiff, a little child, was passing and leaned against the rail looking down into the cellar watching the men at work, when the rail gave way and she fell down into the area and was severely injured. It was held that a case was made out for the consideration of a jury, and Lord Esher, in delivering judgment, referring to the fact that painting was going on, said it must have been known that this would attract children, and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean, while looking down into the cellar where the painting was going on; that was almost an invitation, certainly an inducement to the children to lean against the bar while looking down into the cellar.

The language of the Judges in *Ponting v. Noakes*, [1894] 2 Q. B. 281, is opposed in some respects at all events to the view upon which the *Keffe* case was decided. There the defendant was sought to be made liable for the value of a horse belonging to the plaintiff, his neighbour, which had been poisoned by eating of the branches of a yew tree growing on the plaintiff's land, but no part of which extended over or up to his boundary. It was assumed for the purposes of the decision that a yew tree was a dangerous thing, *i.e.*, it might be injurious if eaten by horses, but it was held that as in order to eat of the yew tree the horse must have got its head at least beyond the defendant's boundary and thereby committed a trespass, the defendant was not liable as he owed no duty to the plaintiff to prevent or take any precaution against his horse

eating of the yew tree. Counsel for the plaintiff contended that the owner of anything capable of attracting cattle and dangerous to them, if they yielded to the temptation was bound to use reasonable care to prevent them getting access to it; but the existence of such a duty was denied by the Court.

Judgment.
Meredith,
C.J.

Mr. Justice Charles, referring to *Deane v. Clayton* (1817), 7 Taunt. 489, at p. 533, and *Jordin v. Crump* (1841), 8 M. & W. 782, said that the question to be asked in each case is: whether the man or animal which suffered, had, or had not, a right to be where he was when he received the hurt, that if he had not, then (unless, indeed, the element of intention to injure, as in *Bird v. Holbrook* (1828), 4 Bing. 628, or of nuisance, as in *Barnes v. Ward* (1850), 9 C. B. 392, is present) no action is maintainable; and referring to an argument founded on the case of *Townsend v. Wathen* (1808), 9 East. 277, said that there was no evidence that the yew tree operated as a trap in the sense of attracting the horse to it, and that in the absence of any such evidence it was the plaintiff's business to keep his horses from going too near the tree, and not the defendant's duty to take any precaution against their doing so.

In this Mr. Justice Collins agreed, and referring to the case put during the argument of a poisonous drug exposed in an open shop front, beside a highway within reach of a child, who being tempted ate it and was injured, expressed the opinion that if an action could be maintained in such a case, it would be only on the analogy of those cases, which decide that a person who makes and keeps a pitfall so near the highway as to be a danger to persons passing along it is responsible in damage to a passenger along the highway who accidentally falls into it, the child obeying its instinct, being regarded as in the same position as a person who without negligence falls off the highway into the pitfall, adding that those cases rest on the special duty incident to the occupation of property adjoining a highway, and that even if the duties in both cases were identical the danger in the illustration was concealed, while in the case of the yew

Judgment. tree it was obvious, meaning, of course, obvious to the
Meredith, owner of the horse.
C.J.

The English cases seem to me to range themselves into the two classes referred to by Mr. Justice Charles, and I have not been able to find any case decided by an English Court in which it has been held that the fact of the injured person being a child of tender years enlarges the duty and consequent liability for breach of duty of the owner of machinery placed on his own land though unfenced, where the machinery is not dangerous in itself but liable to become and becoming dangerous when interfered with, beyond that which exists where the person injured is an adult or person who has reached years of discretion, unless the case comes within one or other of these classes, and *Hughes v. Macfie* is opposed to the view that there is any such distinction even in these cases where the child has been injured in consequence of his own meddling with that which causes the injury to him.

I refer also to *Tolhausen v. Davis* (1888), 57 L. J. Q. B. 392; *S. C.*, 58 L. J. Q. B. 98.

In Scotland, *Lynch v. Nurdin* meets with approval, and the trend of the decisions is in favour of the existence of a duty on the part of the landowner greater than that recognized in *Frost v. Eastern Railroad*, *supra*, though somewhat less than that which was held to exist in the *Keffe* case; see *Campbell v. Ord* (1873), 1 Court of Sessions, 4th series 149; *M'Gregor v. Ross* (1883), 10 *ib.* 725; *Findlay v. Angus* (1887), 14 *ib.* 312; *Ross v. Keith* (1888), 16 *ib.* 86; *Duff v. National Telephone Co. Ltd.* (1889), 16 *ib.* 675; *Haughton v. North British R. W. Co.* (1892), 20 *ib.* 113; *Gibson v. Glasgow Police Commissioners* (1893), 20 *ib.* 466; *Hamilton v. The Hermand Oil Co. Ltd.* (1893), 20 *ib.* 995; *Morrison v. M'Ara* (1896), 23 *ib.* 564.

The only Canadian case which I have met with, *McIntyre v. Buchanan* (1857), 14 U. C. R. 581, proceeds apparently upon the ground that the case made by the plaintiff came within the second of the two classes referred to by Mr. Justice Charles as resting on the special duty

incident to the occupation of property adjoining a highway.

Judgment.

I refer also to two cases decided in the colony of Victoria: *McKinnon v. Morris* (1885), 11 Vic. L. R. 176; *Slade v. The Victorian Railways Commissioners* (1888), 15 Vic. L. R. 190.

Meredith,
C.J.

It is unnecessary for the decision of the case in hand to determine what the limit of the admitted exception to the general rule in favour of children of tender years may be, for, assuming it to be as wide as it was in the *Keffe* case held to be, I am of opinion that the ruling of the learned Judge at the trial was right. There was in my opinion, and indeed the contrary was not argued by the plaintiff's counsel, no evidence to warrant a finding that the defendant's horse-power was being worked in such proximity to the highway as to endanger the safety of persons using the highway, even if they were young children, and therefore entitled to wider limits of deviation than would be allowed to an adult or a person come to years of discretion.

Neither, as I have already mentioned, was there any evidence that the horse-power was so situated as to attract or allure young children to it; and in the absence of such evidence there was nothing to submit to the jury in that aspect of the case.

Nor was there, as I have also pointed out, any evidence that young children were in the habit of resorting, for amusement, to the vacant lot where the horse-power was.

My conclusion, therefore, is that even if the rule laid down in the *Keffe* case be the correct one, the plaintiff's case failed unless the fact that the provisions of ch. 211, of the R. S. O. 1887, were not complied with makes a difference as to the right of the plaintiff to recover.

It follows, I think, from *Finlay v. Miscampbell* (1890), 20 O. R. 29, that the omission of the defendant to comply with the provisions of the Revised Statute as to the safeguards to be supplied to the horse-power gives no cause of action to the plaintiff, but as put by the Chancellor, at p. 36, are "of use only for evidential purposes in regard to

Judgment. the place of the accident being dangerous, and requiring
Meredith, protection," and there being, as I have concluded, no right
C.J. of action at common law, those provisions do not help the
plaintiff.

The plaintiff's motion must therefore be dismissed with costs.

Since writing the above, my attention has been called to Mr. Irving Browne's article on "The Allurement of Infants," American Law Review, vol. 31, p. 891, where an interesting and amusing discussion of the cases on the subject will be found.

MACMAHON, J.:—

Motion by plaintiff to set aside nonsuit entered by Meredith, J., at the Woodstock Assizes.

The plaintiff was at the time of the injury to him causing the loss of one of his feet and for which he seeks to recover damages, over five years old. He, with a brother seven years old, and a boy named Lefebvre, on the morning of the 28th June, went on the defendant's premises, in the town of Ingersoll, where he has a warehouse for storing flour and feed, on the outside of which and to the east thereof he had a single horse-power consisting of a large wheel, about five feet in diameter, with the necessary cog-wheels, tumbling-rod, etc., adapted to run the elevators for elevating the grain and feed to the warehouse, for which purpose it was used.

The defendant was the owner of the lot on which the warehouse was built; the building covering nearly the whole of the lot. The horse-power stood on a lot rented by the defendant in March previous, the machine standing twelve or fifteen feet from the warehouse. The premises were enclosed, except to the south, where they front on Victoria street, the machine being at least thirty feet from that street. The horse which formed the motive power of the machine, and the machine itself, were on that day in charge of a driver, except for a few minutes at a

time, when he required to be in the mill, and, according to the examination of the defendant for discovery put in at the trial, the driver had at the time the plaintiff was injured been absent from the machine for from three to five minutes.

Judgment
MacMahon,
J.

It was not shewn when or how the children reached the lot, nor was there any evidence as to the manner in which the plaintiff received the injury, except as indicated by finding blood on what was called the "travellers" of the machine, and the assumption was that the child had climbed on the machine, which was unprotected, and his foot was caught in the gearing and crushed. His brother and the other boy companion ran away immediately the accident occurred.

No liability could attach to the defendant for injury to an adult who was, while trespassing on the defendant's premises, injured under the circumstances stated. Then, is the defendant's duty, and therefore his responsibility, changed, as regards a child of the age of the plaintiff?

In *Lynch v. Nurdin* (1841), 1 Q. B. 29, where defendant's servant left his horse and cart for half an hour in a street at the door of a house in which the servant remained during that period, the evidence shewed that several children began playing with the horse, climbing in and out of the cart, and while the plaintiff, a child then seven years old, was getting down from the cart, another boy made the horse move, and the plaintiff fell and broke his leg. The plaintiff's conduct in mounting the cart was a trespass to the defendant's chattel, but the Court held that the plaintiff was entitled to recover on the ground that he merely indulged in the natural instincts of a child in amusing himself with an empty cart. Lord Denman, in giving judgment, said at p. 35: "For, if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or

Judgment. either of the two, but unquestionably against the first.
MacMahon, If, for example, a gamekeeper, returning from his daily
J. exercise, should rear his loaded gun against a wall in the play-ground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party." The learned Judge also said that one of the matters for the consideration of the jury in such cases is whether in committing the trespass the plaintiff had "merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief" (pp. 38, 39).

In *Lygo v. Newbold* (1854), 9 Exch., at p. 305, Pollock, C.B., raised a doubt as to the authority of *Lynch v. Nurdin*; but Parke, B., in the same case, at p. 305, draws the true distinction between that and the case of *Lynch v. Nurdin*, which, he said, "proceeded wholly upon the ground that the plaintiff had taken as much care as could have been expected from a child of tender years. In short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question. But here the plaintiff's conduct was blameful, and she had no business to get up into the cart without the defendant's permission."

In *Hughes v. Macfie* (1863), 2 H. & C. 744, where defendants were occupiers of a warehouse on the side of the street into which their cellar opened, and they took off the lid which covered the cellar and left it nearly upright against the wall, a child jumped from the lid and pulled it over, injuring himself and another child, it was held that the defendants were not liable. And Pollock, C.B., in delivering the judgment of the Court, at p. 749, said, "We

think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose, and if he could maintain the action, he could equally do so if the flap had been placed inside the defendants' premises within sight and reach of the child. As far as the child's act is concerned, he had no more right to touch this flap for the purpose for which he did touch it, than he would have had if it had been inside the defendants' premises. Cases were referred to, supposed to be in favour of the plaintiff. We think none are decisive of this case, and no case establishes a principle opposed to our view, which is, that the nonsuit was right."

Judgment.
MacMahon,
J.

In *Mangan v. Atterton* (1866), L. R. 1 Ex. 239, the Court held that the defendant was not liable where he exposed in a public street in Sheffield, for sale, unfenced and without superintendence, a machine which might be set in motion by any passer by, by turning a handle on one side of it, and which was dangerous when in motion, that the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed.

That case was dissented from in *Clark v. Chambers* (1878), 3 Q. B. D., where Cockburn, C. J., at p. 339 of the judgment says: "If the decision (*Mangan v. Atterton*) as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

In *Bailey v. Neal* (1888), 5 Times L. R. 20, where the plaintiff, a child aged nine and a half years, had left school

Judgment. and while trying to clamber on a heavy massive roller standing in the street near the school, got his fingers caught in the wheels in consequence of another little boy tampering in play with the shafts of the roller. The shafts of the roller were reversible, so as to enable the roller to go backwards or forwards by simply reversing the shafts by turning them around the roller, they had been duly secured by a strong rope which would have held them fast *in situ* and rendered them immovable had not the other child cut the rope and so disengaged the shafts.

MacMahon,
J.

The Court (Coleridge, L. C. J., and Grantham, J.) said that the absence of negligence was clearly demonstrated by the fact that the shafts were tied; but even if they had not been, it was at least very doubtful if there was negligence in leaving the machine where it was.

The last statement in this judgment is opposed to the view expressed by Cockburn, L. C. J., in *Clark v. Chambers* (1878), 3 Q. B. D., p. 339.

Mann v. Ward (1892), only reported in 8 Times L. R. 699, was an action for personal injuries against a cab proprietor. The plaintiff was knocked down and injured by a cab belonging to the defendant, the licensed driver being inside drunk, and the vehicle being driven by an unlicensed man also drunk but not in the service of the defendant. It was held that the defendant was not liable. During the argument *Lynch v. Nurdin* was cited by plaintiff's counsel, when Lord Esher, M. R., stated that "it has always been doubted." But in *Engelhart v. Farrant & Co.*, [1897] 1 Q. B. 240, Lopes, L. J., at p. 246, referring to *Mann v. Ward*, said: "I doubt if it is fully reported. It must be regarded as a decision on the very peculiar facts of that case, and, if correctly reported, the decision is one at which I could not myself have arrived."

In fact, if the stranger in *Mann v. Ward*, instead of getting on the box and driving off, had whipped the horse, it would have been the case of *Illidge v. Goodwin* (1831), 5 C. & P. 192, over again. For as the driver in *Mann v. Ward* was lying drunk inside the cab, the defendant was

in the same position as if no one was left in charge of the horse and cab.

Judgment.
MacMahon,
J.

The last English case touching injury to children by dangerous instruments placed in public places, is *Fenna v. Clare & Co.*, [1895] 1 Q. B. 199. The defendants were the owners of a low wall, eighteen inches high, immediately abutting upon a public highway. On the top of the wall was a row of sharp spikes which, as the jury found, was a nuisance to the highway. The plaintiff, a little girl, was found standing on the highway by the wall with her arm bleeding from a wound, such as might have been caused by her falling upon the spikes. No person witnessed the accident. The plaintiff sued the defendants for damages for the injury sustained. At the trial the plaintiff was not called as a witness, nor was any other evidence than the above given as to how the accident happened, except that of a witness who shortly before the accident saw the plaintiff climbing up upon the wall and told her to get down, which she did. Baron Pollock, in his judgment, at p. 201, said: "The defendants maintained, at a spot immediately abutting on a public highway, a spiked wall which the jury have found to be a nuisance. Then a child is found on the highway close to the wall with her arm injured, and injured in such a way as is consistent with the injury having been caused by her stumbling against the spikes whilst lawfully passing along the footpath. In my judgment, it cannot be said that there was no evidence on which the jury might have found that the injury was caused by the nuisance whilst the plaintiff was using the highway in a proper manner."

As said by Lopes, L.J., p. 246, in *Engelhart v. Farrant & Co.* "It is impossible to reconcile the various decisions with regard to negligence; and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite." This is particularly the case in regard to the kind of negligence imputed here causing injury to a child. This is strongly illustrated in an

Judgment.
MacMahon,
J.

admirably written article contributed by Mr. Irving Browne to The American Law Review for 1897, p. 891, under the title of "The Allurement of Infants," where the writer states that the doctrine of *Lynch v. Nurdin* has been generally followed in the United States, but is rejected in Massachusetts. He also says (p. 896), "When we come off the highway or other public grounds, where infants have a right to be, and come upon private lands, we meet the extended doctrine, that if the owner maintains anything thereon near the highway, or in the vicinity of which he permits the public to go, which is in its nature alluring to children, and to which he has reason to know that they resort, and which is dangerous to children, because unguarded, he is liable for any accident resulting therefrom. The chief class of cases illustrative of this principle is the turn-table cases in which the Courts of this country are now pretty evenly divided in opinion, according to authority, if not according to number. Viewing with tenderness the boyish propensity to ride on a convenient and unlocked turn-table we find the Courts of the United States, Kansas, Minnesota, Missouri, Nebraska, Texas and California. While frowning on this boyish intrusion on corporate rights are those of Massachusetts, New York, Illinois and New Hampshire. Some of those decisions were influenced in some measure by the nearness of the dangerous object to the highway."

The turn-table cases to which he refers are where children have trespassed on the lands of railway companies and have started the turn-tables (used for turning cars and engines) and while riding thereon have been injured.

Although there have been expressions of individual Judges not fully in accord with the decision in *Lynch v. Nurdin*, that case has never in terms been overruled and in English text-books is still quoted as being law; but regarding it as such, the widest meaning which could be given to the language in the judgment in that case and in the case of *Clark v. Chambers*, is that a person is guilty of negligence who leaves unattended and unguarded in a

public street or other public place, to which children are in the habit of resorting or along which they have to pass, a dangerous machine or a machine which may prove dangerous by being meddled or interfered with by them.

Judgment.
MacMahon,
J.

In *Lynch v. Nurdin* there was merely a technical trespass by the child to the defendant's personal property. In the case in hand, the plaintiff committed a trespass on defendant's land before reaching his personal property, on which he was likewise trespassing when injured.

Holbrook v. Aldrick (1897), 168 Mass. 15, is important as embodying the opinion of the Supreme Court of that State as to the law governing the accidental injury to children while committing a trespass to the property of a person sought to be made liable for such injury. There, a child less than seven years old entered a shop with her father, who was going to make a purchase. She (plaintiff) intended to buy some candy, but in the first place accompanied him to a part of the shop at some distance from the candy counter and near to a coffee-grinder. He let go her hand to get his money, and she went over to the coffee-grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers:—

Held, that she could not recover against the shop-keeper for her injuries.

In delivering the judgment of the Court, Holmes, J., said, at p. 16: "As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

The language of Mr. Justice Charles in *Ponting v. Noakes* (1864), 10 Rep., at p. 269, is to the like effect, saying: "The true test in each case is pointed out by Chief Justice Gibbs in *Deane v. Clayton* (1817), 7 Taunt, 489, where he says: 'We must ask in each case whether the man or animal which suffered had or had not a right to be where he was when he received the hurt. If he had

Judgment. not, then (unless indeed the element of intention to injure,
MacMahon, as in *Bird v. Holbrook* (1828), 4 Bing. 628, or of nuisance,
J. as in *Barnes v. Ward* (1850), 9 C. B. 392, is present) no
action is maintainable.

I regard *Jewson v. Gatti* (1886), 2 Times L. R. 441, as falling under the class of cases of which *Barnes v. Ward* is the leading authority. In the *Jewson* case there was an open area over the defendant's cellar on a public street, and although it had a bar or rather railing, it was insufficient to withstand the pressure of persons at the area on the street leaning against it; and, therefore, as put by Lord Esher, M.R., in his judgment, was left unprotected. A nuisance was, therefore, created in the highway; and the defendant would have been liable for injury caused to any one by reason of the nuisance so created. The Master of the Rolls, however, also places the liability on the other ground, that it must have been known the painting going on in the cellar would attract children, and that the bar put up outside for the purpose of protection, against which children would naturally lean while looking into the cellar where the painting was going on, might be considered an invitation, certainly an inducement to the children to lean against the bar while looking down into the cellar; and that a child who leant against it by reason of which it gave way and fell into the cellar and was injured was entitled to recover for such injury.

When a machine or instrument is dangerous if left unguarded and is from its nature alluring to children and if left in a public street or public place or in such close proximity thereto as to be easily accessible to them, and if it is known to the owner that children are in the habit of resorting to such place, he may be held guilty of negligence and liable for an accident resulting therefrom.

But in the case in hand the machine was a distance of at least thirty feet from the highway and was not a machine likely to attract children; and the place was not resorted to by them to the knowledge of the defendant.

The argument for the plaintiff, founded on the non-

compliance by the defendant with the provisions of the Act (R. S. O. 1887 ch. 211) requiring the owners of threshing and other machines to protect them so as to prevent injury to persons near them, is answered by the judgment in *Finlay v. Miscampbell* (1890), 20 O. R. 29. Judgment.
MacMahon,
J.

The appeal must be dismissed with costs.

ROSE, J., concurred in the result.

See Harrold v. Watney, 14 Times L. R. 364.

G. A. B.

[DIVISIONAL COURT.]

SMITH V. SMITH.

Parent and Child—Specific Performance—Agreement for Maintenance of Parent—Definite Contract—Evidence—Change of Parent's Intention—Improvements.

When a child seeks to enforce an agreement that if he remains with a parent and works his farm and provides for his declining years the parent will bestow the farm on him, the agreement must be established by the clearest evidence and a certain and definite contract for a valuable consideration proved. In the absence of such evidence the parent will be entitled to change his views and the disposition of the property. In this case the son who had made certain improvements on the property was held not to be entitled to a lien for them.

Judgment of ROSE, J., reversed.

THIS was an appeal from the judgment at the time in an action tried at Simcoe on October 4th, 1897, before ROSE, J., without a jury. Statement.

The facts and the evidence relied on to prove the agreement alleged in the statement of claim appear in the judgment of STREET, J., in the Divisional Court.

G. W. Wells, Q. C., and H. P. Innes, for the plaintiff.
W. R. Riddell, and W. E. Kelly, for the defendant.

Judgment. October 11th, 1897. ROSE, J.:—

Rose, J.

I find, as a fact, that in or about the year 1885, a parol agreement was entered into between the plaintiff and the defendant, by the terms of which the defendant was to remain on the farm with his father and mother, assisting to work and manage the farm, and in that sense assisting to support his father and mother during their lives, and that in consideration of such services the father agreed to leave the farm in question to the defendant by will.

I further find, as a fact, that the defendant has so far substantially performed his part of the agreement.

I find further that the plaintiff made a will leaving the farm to the defendant: that such will was made pursuant to such agreement; that on the 29th of March, 1897, he made a new will devising the farm to his children other than the defendant, and that this was done in breach and violation of the agreement referred to, and was in consequence of the plaintiff having changed his feelings towards the defendant, by reason of an alleged grievance arising from a slight cause, trifling in the extreme.

I think, however, that this is not such an agreement as I can decree specific performance of: see *Roberts v. Hall* (1882), 1 O. R. 388, and especially at page 400, where the Chancellor of Ontario said: "Doubtless as in all personal contracts of a continuing character, * * that" (specific performance) "could not have been granted by the Court," citing *Kennedy v. May* (1863), 11 W. R. (Ch.) 358.

The plaintiff may live for many years, and it might be that the defendant's feelings towards his father would so change that he would not be willing to continue to manage the farm, or assist in maintaining his father during the coming years. At any rate it is not such an agreement as the Court can provide for the performance of.

The father has elected to put an end to the agreement, and has required the son to give up possession of the farm, and has thus rendered it impossible for the son for the future to perform the services which he has agreed to per-

form. I refer also to *Maddison v. Alderson* (1883), 8 App. Cas. 467; *McGugan v. Smith* (1892), 21 S. C. R. 263. Judgment.
Rose, J.

But I find, as a fact, that the son has, by buildings which he has erected and by otherwise improving the farm, increased its value, and that he has expended not only time and labour but also his own money in so doing. Following *Biehn v. Biehn* (1871), 18 Gr. 497, I think the son is entitled to a charge upon the land for such improvements and for the services rendered, which I find were not gratuitous, nor intended to be gratuitous, but were for reward promised by the father. I think the defendant is entitled to an allowance: see *McGugan v. Smith*, *supra*; *Walker v. Boughner* (1889), 18 O. R. 448; *Roberts v. Hall*, *supra*. There must be a reference to the local Master to ascertain the value of the improvements and of the services.

Further directions and costs reserved to be disposed of after the report is made.

From this judgment the plaintiff appealed, and the appeal was argued on February 3rd, 1898, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

G. W. Wells, Q. C., for the appeal, contended that the evidence was not sufficient to prove any such agreement as was alleged, and that more was required to establish such an agreement between a father and son than between strangers: that the expressions used in conversation by the father were merely of an intention to devise irrespective of any contract and the will alleged to be made in pursuance of the agreement was not so made and was made eight years after the agreement; that even if it was made in pursuance of the agreement it was not part performance; that the alleged acts of part performance were not done in pursuance of any agreement or contract but were merely the ordinary and customary services of a farmer's son

Argument. living at home ; that the effect of the trial judgment was to override section 4 of the Statute of Frauds which was set up by the plaintiff and would uphold an agreement respecting lands of which specific performance would not be decreed ; and the declaration that the defendant was entitled to a lien was wrong, as no lien for damages should be declared when there was no mistake of title and that such an agreement could not be enforced on the line of such cases as *Walker v. Boughner* (1889), 18 O. R. 448 ; *Smith v. McGugan* (1892), 21 A. R. 542, per MACLENNAN, J.A., at p. 552 ; *S. C.* (1892), 21 S. C. R. 263 ; *Murdock v. West* (1895), 21 S. C. R. 305 ; which were not cases of a devise of lands. He referred also to *Maddison v. Alderson* (1883), 8 App. Cas. 467 ; *Campbell v. McKerricher* (1883), 6 O. R. 85 ; *Orr v. Orr* (1874), 21 Gr. 397 ; *Jibb v. Jibb* (1877), 24 Gr. 487 ; *Turner v. Prevost* (1890), 17 S. C. R. 283 ; *Sprague v. Nickerson* (1844), 1 U. C. R. 284 ; *Redmond v. Redmond* (1868), 27 U. C. R. 220.

W. R. Riddell, and *W. E. Kelly*, contra, contended that the evidence was more than sufficient, and supported the findings of the trial Judge. [ARMOUR, C. J.—Is this case any stronger than *Jibb v. Jibb* ?] We claim a lien under *Biehn v. Biehn* (1871), 18 Gr. 497. [STREET, J.—But the statute 36 Vict. ch. 22 (O.), was subsequently passed in 1873, and now governs.] The statute did not take away any previously existing right, and *Biehn v. Biehn* has never been overruled, and the defendant is entitled to a lien for the amount that the land has been benefited by the improvements and the value of his services.

Wells, Q. C., in reply.

February 17th, 1898. The judgment of the Court was delivered by

STREET, J. :—

This is an action by Patrick Smith against his son Martin Smith for a declaration that the plaintiff is the sole owner of a certain farm in the township of Windham,

and for an order that the defendant deliver up possession to him.

Judgment.

Street, J.

The father is a widower of seventy years of age ; the defendant is a married man of about forty, and the circumstances raise the constantly recurring question as to the extent of the rights, if any, of a son who works with or for his father upon an understanding or expectation that the father's farm shall become his at the father's death.

The defendant in January, 1880, purchased for himself a fifty acre lot adjoining his father's farm, which was paid for within a year or two of the purchase principally, as the defendant says, from the timber upon it. The defendant's brothers seem to have assisted to some extent in clearing it.

In 1885 the plaintiff and his wife with the defendant and his brother John were the only members of the family who had not permanently left the homestead.

The defendant's account of the conversation upon which he relies as giving him the right which he claims is as follows :—

"Well, in 1885, my brother John had some sheep there, and a horse, and he seen it would not pay him to stay there and keep the place and work it until father and mother's death, so he proposed selling out, and in 1885, in the latter part of March, father agreed with me that if I would take the place and work it, and keep him and mother, after their death the place would be mine, and I bought my brother out.

"Q. Where was that arrangement made? A. In our house.

"Q. What about the stock? A. Well, at that present time there was not a great deal of stock on there.

"Q. Was there anything said about that? A. I was to take the stock, have the stock, and work the place with it.

"Q. Was there anything said about what was to happen to the stock after your father's death? A. No, not about the stock.

"Q. And you were to have the farm after his death?"

Judgment. He says that no one was present at this conversation
Street, J. but a farm labourer named Sullivan, who is dead, and his own mother, who is also dead.

Upon cross-examination the following took place :—

“Q. You never asked him to make you a deed? A. No.

“Q. And you have not requested him to do anything with reference to that agreement he made? A. No.

* * * * *

“Q. Never had any talk with him about any will? A. No, not to amount to anything. He said one time that he would will it, then he said we would pay for it, and he would deed it and take a life lease.

“Q. When was that? A. In 1885, in the Spring.

* * * * *

“Q. And you did not recollect that he said anything about a deed or life lease (when you were examined) last Monday? A. No.

“Q. That has all come to you since? A. Yes.”

The corroboration of the defendant's statement was as follows :—

James Grant stated that the plaintiff told him several times within the last three or four years that he intended to give his son Martin the farm, and to sell the stock and pay some little bills and have a little money for himself, and divide the rest with the rest of the family. Sometimes he qualified it by saying that if Martin behaved himself he would get the land, and of late he said he had intended Martin to have the land, but that he wouldn't get it now because of the way he had been using him.

Elizabeth Carroll who worked for the plaintiff and the defendant from July, 1895, to August, 1896, said that the plaintiff often told her that when he would die, if Martin stayed there, and did as he should, he should have the place.

Levi S. Jay worked for the plaintiff and defendant for eight or nine months in each year from 1888 to 1890; he said that the plaintiff told him the farm and stock were

his, and would continue his until he was through with them, and when he was through with them "he calculated Martin would have them," or "they belonged to Martin." Being asked, "What did he say about the agreement?" he answered, "He said the agreement was that Martin was to keep him as long as he lived, and the thing was Martin's, the farm and everything."

Judgment.
Street, J.

Being cross-examined he said that the plaintiff said there was an agreement, and that "the things were all Martin's at present, and that the farm was to be his when he (the plaintiff) was done."

John A. Gardham, a cheesemaker, said he had a conversation with the plaintiff in November, 1893, in which he said that he had given up everything to the defendant; that the defendant had taken the whole thing into his hands, and he expected he would take a deed and pay for the place; that he himself was too old to work and wanted a living, and that the defendant would run the place, and he would have his living out of it.

There was evidence that about three years before the trial the plaintiff had made a will leaving the farm to the defendant and the stock to his children equally.

Joseph Carter said that about three years before the trial the plaintiff said he was going to give the place to the defendant.

The plaintiff was examined in reply, and denied ever having promised this farm to the defendant. He said "I told him if he used me well, and everything went off well, he might have it."

Reading his evidence I should come to the conclusion that his memory was not at all to be depended on; he has denied having said many things which he would very naturally have said, and which are sworn to by the defendant's witnesses.

The plaintiff and his wife and the defendant lived together on the homestead from 1885 until 1895 or 1896, when the plaintiff's wife died. The defendant married soon afterwards, and disagreements arose between the

Judgment. plaintiff and the defendant. The plaintiff advertised the stock for sale, and the defendant forbid the sale and registered a claim to the land in the registry office, after which this action was brought.

Street, J.

About 1888 one of the plaintiff's sons, James, came to work upon the air line in the neighbourhood, and boarded for two years at his father's house, and swore that his father at that time was "running" his own farm and selling his own stock; that the plaintiff and defendant used both to work on both places.

The farm in question has always been assessed to the plaintiff, as owner in occupation, and he has always himself paid the taxes upon it.

The defendant swore that since 1885, he had stumped thirty-six acres of his father's farm, and had put up a hen coop and work shop worth \$90, a corn crib worth \$25, besides shingling the side of the barn, repairing the house and fences, some \$30 worth of draining, etc. It appeared, however, that the horses of the plaintiff were used in the stumping operations, and that the men employed in the different works were boarded at the house in which the plaintiff and his son lived.

My brother Rose has found, after hearing the evidence, that an agreement existed between the plaintiff and defendant entitling the defendant to the farm at his father's death, provided he should continue to support him during his life; that this being a contract involving personal services on the defendant's part cannot be specifically performed, but that the defendant is entitled on the breach of the agreement by the plaintiff to a lien upon the land for the improvements he has made, and this judgment has been brought for review before the Divisional Court.

I concede at once that it would be more satisfactory if we could in the present case give some measure of relief to the defendant, who has remained and taken care of his father and mother for so many years, after their other children had left them, but I am unable to agree that we can, consistently with the authorities, find that the defen-

dant has acquired any rights at all upon a proper view of the evidence upon which we have to pronounce.

Judgment.
Street, J.

I do not think any case of this character can be properly decided which is not decided in accordance with the principles laid down in the Court of Appeal by the late Chief Justice Richards in *Orr v. Orr*, 21 Gr., at p. 425, which are condensed in the following passage, quoted with the fullest approval as expressing the views of the Court of Appeal, by the late Chief Justice Spragge, in *Jibb v. Jibb*, 24 Gr. 487, at pp. 493-94. "If children are not disposed to reside with their parents and give to them that comfort and assistance which their duty requires, trusting to the affection of the parent to bestow on them a share of their world's goods, then, if they wish to shew that an agreement has been made which is to bind the parent by force of law and not by the better feeling of affection, courts ought to require that such agreements shall be established by the clearest evidence; and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind himself so that he cannot change that intention, (it will be considered that all he means to say is,) that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property, if he finds his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views."

The contract which my brother Rose finds to have been made here is a contract to make a will of this land in the defendant's favour. The remarks of the Court upon such contracts in *Shakespeare v. Markham* (1877), 10 Hun 311, quoted in *Walker v. Boughner*, 18 O. R. 448, at p. 454, express what I understand to be the law of this Province. The Court says, "But on the cases in which such contracts are set up, and especially where they are attempted to be established by parol testimony, the temptation and oppor-

Judgment. tunity for fraud is such that they are looked upon with
Street, J. suspicion, and the Courts require *the clearest evidence* that a contract founded on a valuable consideration, and certain and definite in all its parts, should be shewn to have been deliberately made by the decedent."

Having regard to the care with which the legislative safe-guards against fraud in the making of wills have been framed from time to time, and the inflexibility with which the Courts have supported them, it is certainly not going too far to require that "the clearest evidence" shall be furnished of a contract which is to have all the effect of a will and is to take effect after the death of the person who contracts to become a testator.

The first thing that strikes one in carefully going over the pleadings and evidence in the present case is the uncertainty displayed by the defendant himself in his statements made at different times as to the terms of the contract.

In his statement of defence he says that he claims to be entitled to the land, "and to hold possession thereof under an agreement made on or about the year 1883, whereby the defendant was to remain and live with plaintiff in and upon said farm and work and manage the same for the plaintiff during his (plaintiff's) lifetime, for which the defendant was to receive from the plaintiff for such services said farm as his absolute property upon the plaintiff's decease; the said farm the plaintiff also agreed to leave to defendant by will to be his (defendant's) absolute property as aforesaid for such services and work."

According to this statement the farm was to belong to him at the plaintiff's decease, and the plaintiff's wife is not mentioned.

Being examined for discovery he states the bargain to have been that if he would go on and work the place and clear it up, stump it and take charge of everything, and take care of his father and mother, that after *their death* the place would be his. Then in his cross-examination at the trial he says that he has remembered

since his examination for discovery, that at the time the agreement was made, viz., in March, 1885 (and not in 1883, as stated in the statement of defence), his father at first said that he would will the place to him, and then he said that they would pay for it, and he would deed it and take a life lease. This, from his evidence, I think, must be taken to have been the final agreement made, if any agreement at all is to be taken to have been made, but he himself, down to the time of his cross-examination, was so little impressed with the exact nature of the arrangement that he had entirely forgotten until then that anything had been said about a deed or a life lease.

Judgment.
Street, J.

The testimony adduced as corroboration of the agreement is equally uncertain and vague in its character, as indeed is to be expected, consisting, as it does, entirely of the recollection of the witnesses as to casual remarks made to them by the plaintiff years before the trial.

With great respect for the view of my brother Rose I am compelled to the conclusion that the contract alleged by the defendant is not supported by evidence at all approaching the standard laid down as being necessary to establish it in the cases to which I have referred; and having arrived at this conclusion, I think we are driven to adopt the further one, that nothing has been proved against the plaintiff of a more definite and binding character than the expression of an intention to leave the property in question by his will to the defendant—an intention which the defendant must be taken to have known was subject to alteration at any time. The expression of such an intention could give the defendant no rights in the property, even though he should do some extra work upon it in the expectation of its fulfilment, for he must be taken to have done the work with full knowledge that others might reap the benefit of it: *Ramsden v. Dyson* (1865), L. R. 1 H. L. 129; *Plimmer v. The Mayor, etc., of the City of Wellington* (1884), 9 App. Cas. 699; *The Unity Joint Stock Mutual Banking Association v. King* (1858), 25 Beav. 72.

Judgment,
Street, J.

In any event it appears to me that the improvements claimed for by the defendant are very largely if not entirely such as a son living on his father's farm and working with and for him would be likely to have made, even without any expectation of ownership. The buildings erected were mere sheds apparently of a trifling value the well and the fencing and the painting and repairs to the house were also inexpensive matters, spread over a period of several years. The amount of stumping done is disputed, and it is admitted that the plaintiff's horses were used in the work. The account of these matters would be an extremely difficult and expensive one to take, and would perhaps involve the whole of the dealings of the parties with the plaintiff's farm and stock from 1885 to the present time.

For the reasons I have given I think the plaintiff is entitled to the declaration he asks for, and for an order for possession, and for an order excluding the defendant from possession and ordering the defendant to pay the costs of the action and of this motion; the costs of the examination for discovery of the defendant are not to be taxed to the plaintiff.

G. A. B.

IN RE CHESTERVILLE PUBLIC SCHOOL BOARD.

Public Schools—Dissolution of Union School Section—Power of Arbitrators—59 Vict. ch. 70, secs. 43, 44, 53, 54. (O.).

Arbitrators appointed by a County Council under sec. 44 of the Public School Act, 1896, 59 Vict. ch. 70 (O.), awarded that a certain union school section, which comprised a rural section and an incorporated village, should be dissolved, and that all the lands included in the rural section "be attached to and form the same for school purposes," and that all the lands included in the village, "shall remain attached to and form the urban section" of the said village for such purposes:—

Held, that though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation subject to the provisions of sections 53 and 54 of the Act, and the rural section as a non-union school section subject to the provisions of sections 9 and 13 of the Act, and that the award was valid as an exercise of power under sub-section 5 or 6 of section 43.

Semle, the arbitrators would not have been justified in taking a portion of the territory outside the village and attaching it to the village.

THIS was a motion to set aside an award made under the Public Schools Act, 1896, 59 Vict. ch. 70, (O.), under the circumstances set out in the judgment, and was argued on February 8th, 1898, before ROSE, J. Statement.

Aylesworth, Q.C., for the school section, the applicant, referred to 59 Vict. ch. 70, (O.), especially to secs. 5, 43, 44, 52, and contended that the arbitrators' authority could not be limited as purported in the appointing by-law, and as understood by themselves; that what the statute provides is that if there be a dissolution of an existing union school section the lots that are detached are to be parcelled out among other existing school sections, not that a new union school section be formed out of other adjoining sections added to a portion of the existing union; that if there be a village section left, sections 53 and 54 of the Act constitute that a school section by itself, but that the arbitrators had no right to form a new rural section as attempted here.

R. O. Clute, Q.C., and *Hilliard*, for certain ratepayers of the township of Winchester, referred to sections 9 and 11 of the Act, and contended that the arbitrators had not excluded anything improperly from consideration, that there was no intention to form a new school

Statement. section but only to dissolve the old, and that the arbitrators were judges both of law and fact, and cited *In re McAlpine and The Township of Euphemia* (1880), 45 U. C. R. 199; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189.

March 7th, 1898. ROSE, J.:—

This was a motion to set aside an award made under the Public Schools Act, 1896, 59 Vict. ch. 70, (O.).

Although many grounds were taken in the notice of motion, all that was asked to be determined, as I understood Mr. Aylesworth, was the question of jurisdiction of the arbitrators under section 44 and whether that jurisdiction had been limited by the by-law appointing the arbitrators so as to prevent the proper exercise of the powers conferred upon them by section 43 of the Act, or whether the arbitrators had declined to exercise the jurisdiction conferred upon them by the statute.

School section No. 8 included the village of Chesterville prior to its incorporation. Upon the incorporation of the village as an urban municipality, the former school section became, under section 49, a union school section. Section 49 declares that after the formation of such union school section the provisions of the Public Schools Act respecting the election of public school trustees in urban municipalities shall apply thereto until such union is altered or dissolved as provided by the Act.

In or about January, 1897, petitions were presented to the council of the township of Winchester by ratepayers of that township, and to the council of the village of Chesterville by the ratepayers of such village, setting forth that the petitioners were desirous that union school section No. 8 should be dissolved and a new section formed. In the petition to the township council, the prayer was that the section "be formed out of the farming class or ratepayers now belonging to Chesterville union school and certain other farmers that now live a long way from the school in the section to which they now belong." And in

the petition to the village council, "that a new section be formed out of the farms now belonging to said union section and a number of others belonging to other sections, but living a long distance from their schools." The petitions requested the council to appoint an arbitrator under section 43 of the Public Schools Act.

Judgment.
Rose, J.

On the 20th day of March, 1897, the arbitrators appointed pursuant to the prayer of the petition awarded as follows: "The arbitrators do not see that they have sufficient reasons to justify them in dissolving the union, and therefore decide that they are unable to grant the petition."

Thereafter, and on the 12th day of April following, an appeal in writing was made, pursuant to the provisions of section 44, against the award, the appeal being to the counties council. The petition set out the reasons for making the appeal, and stated (section 8) that the injustice which they complained of could only be righted "by a dissolution of the said union section and the permitting them to build and maintain a school of their own, with a qualified teacher at a salary much less than that of \$500." The prayer of the petition was that the council should "hear their petition against said award and grant their request to appoint an arbitrator or arbitrators" as seem best to the council and as provided by section 44 of the Public Schools Act, "who will hear the evidence produced and make the award thereupon."

On the 26th day of June, 1897, the counties council passed a by-law appointing arbitrators "to hear evidence and make an award under section No. 44 as to the advisability of continuing said union school section comprising said school section No. 8 of the township of Winchester and the corporation of the village of Chesterville, or dissolving the same as asked for by the said appeal."

The proceedings before the arbitrators are set out, and the arbitrators on the 15th September, 1897, by a majority, one of the arbitrators dissenting, determined "that the grievances submitted and evidence taken justify a dissolu-

Judgment**Rose, J.**

tion of the existing union school section No. 8, and constituting the rural portion thereof a school section separate and apart therefrom."

On a day subsequent, at a further meeting before the arbitrators, counsel agreed that "the village portion of the section will pay to the rural portion the sum of \$500 on the first day of September, A.D. 1898, without interest, as its proportion of the value, on the basis of three-tenths and seven-tenths of the school buildings, grounds, equipment, and everything connected with the public school site at Chesterville union school section No. 8, Winchester township," and "that the cost of the arbitrators and the clerk, together with a sum which to them appears reasonable for fees of counsel engaged should be borne by the union school section No. 8." This consent seems to recognize rural school section No. 8 as a legal entity.

At this stage, Mr. Lawson, one of the counsel, tendered evidence of the desire of Jacob Merkley, Patrick Allen, John C. Hummell, and James C. Castleman, to have that portion of their lands which is without the corporation of Chesterville remain attached to and assessed for the public school of Chesterville village for school purposes.

The arbitrators conferred and announced "that they did not consider they had power to grant the desire of the above named parties, but considered that they were restricted by the terms of by-law No. 1167 of the county council appointing them to either continue intact or dissolve as asked the said union school section No. 8."

The arbitrators then framed their award, one of the number dissenting and giving his reasons for dissenting which are not material to this motion. The award provided "that said union school section of Winchester township, county of Dundas, constituted as aforesaid, be and the same is hereby dissolved." The words "constituted as aforesaid" I take to refer to the heading of the award, which is in these words: "In the matter of a certain arbitration respecting the dissolution of union school section No. 8 of the township of Winchester (comprising the

incorporated village of Chesterville and rural section No. 8, both in said township)." Judgment.
Rose, J.

The award further provided as follows: "That all the parcels of land included within the boundaries of rural school section No. 8 aforesaid be attached to and form the same for school purposes, and that all the parcels of land included within the boundaries of said incorporated village of Chesterville, shall remain attached to and form the urban section of Chesterville village for such purposes." The other provisions of the award were in accordance with the agreement of the parties which I have above set out.

The objection to the proceedings and to the award is founded upon the consideration of the language of sub-section 5 of section 43. Section 43 provides for the dissolution of union school sections; and sub-section 5 declares that "in case the arbitrators shall determine upon the dissolution of an existing union they shall set forth in their award the section or sections to which the parcels of land comprising such union shall be attached for school purposes." It was argued that it was the duty of the arbitrators upon dissolving the union to attach the parcels of land comprising the union to other school sections, and that when the arbitrators determined that their powers were limited by the by-law to simply declaring a dissolution of the union, they were refusing jurisdiction which was conferred upon them by the statute. The jurisdiction of the arbitrators, apart from the words of the by-law, was conferred by section 44, which provides that they "shall have all the powers of arbitrators appointed under section 43." They therefore had all the powers conferred by section 43, and it is clear that if they refused to act or to exercise any of their powers by reason of the provisions of the by-law, their award was not final or conclusive upon the matters which by statute were referred to them.

The arbitrators evidently were of the opinion that school section No. 8 continued to exist although as part of a union school section after the incorporation of the village,

Judgment.

Rose, J.

and that the dissolution of the union left the village as an urban municipality, and school section No. 8 a non-union section, being old school section No. 8 minus the village. The award seems to be drawn with a view to complying with the provisions of sub-section 5, and the language used in the clause which I have above set out, declaring that the parcels of land included within the boundaries of rural school section No. 8 aforesaid be attached to and form the same for school purposes, etc., seems to be used in an effort to make the provisions of that sub-section apply.

If school section No. 8 continued to exist as part of the union school section, and if the effect of the dissolution was to leave it as a non-union school section, the language used in the award is plainly insensible. The parcels of land which were included in such school section of course comprised such school section and could not be said to be attached to it. Similar language was used with reference to the parcels of land within the boundaries of the village, and is, I think, insensible. The effect of the clause seems to me to be to dissolve the union, recognizing the village as a corporation subject to the provisions of sections 53 and 54, to which I shall refer, and school section No. 8 as a non-union school section subject to the provisions of certain other sections, to which also I shall refer.

By sections 53 and 54, provision is made for the election of trustees upon the incorporation of an unincorporated village, and it is declared that the board thus elected shall be a corporation by the name set out in the section. There was, therefore, no necessity for making any declaration with regard to the village, when once it was dissolved from the union. Sections 53 and 54 made express provision for such purpose. Nor do I think there was any necessity for providing for the territory of school section No. 8 which remained after the incorporation of the village. Unless the incorporation of the village destroyed school section No. 8 entirely, it merely withdrew a portion of the territory and left it as a school section in union with the village; and when the village was withdrawn by the

dissolution, it then remained as it was, less so much territory as had been thus withdrawn. And provision is made by sections 9 and 13 of the Act for the election of trustees for such a rural non-union section.

Judgment.
Rose, J.

I see no inconvenience in thus holding, for if the rural school section No. 8 is held to have continued to exist and it should be thought to comprise too small a territory and too few pupils, provision is made by section 38 for altering its boundaries, dividing it into two or more sections or uniting portions of it with another section or with a new section. And so it seems to me that although sub-section 5 was drawn, probably not having in view such a case as the present, by analogy a scheme may be worked out such as I have indicated. The effect of the dissolution, therefore, would be to leave the village as a corporation empowered to appoint trustees under section 54, and the remainder of the union school section as a non-union school section No. 8, with trustees to be appointed under sections 9 or 23.

But even if the award could not be sustained upon the grounds which I have suggested, it may be that it can be well sustained as an exercise of power under sub-section 6 of section 43, which is as follows: "Where the arbitrators find that it would be in the interests of the parties concerned, and where in their opinion it is practicable so to do, they may at their discretion form part of the territory of any union section into a non-union section or form a new union, and in such cases they shall indicate the parcels of land of which such union or non-union section shall be composed. The remainder of the union section shall be disposed of as hereinbefore provided." What in effect has been done here, if the result of the award is to declare all of the union school section that remained after the incorporation of the village a new non-union school section, was to leave the village as a corporation to form its own board, declaring that it should be, in the words of the award, "an urban section," and to constitute the remainder, being part of the territory, into a non-union school section, called,

Judgment.

Ross, J.

in the words of the award, "rural school section No. 8." If that was the effect of the award, that was in the discretion of the arbitrators, and the result would be to dissolve the union and then to form part of the territory of the union school section into a non-union section, or the two parts of the union section into two non-union school sections, if such language would be applicable to an incorporated village. The words, "the remainder of the union school section shall be disposed of as hereinbefore provided," need not be considered as in such event there would be no remainder.

I do not think that under either sub-section 5 or sub-section 6, the arbitrators would have been justified in taking a portion of the territory outside of the village and attaching it to the village. I do not think that the language of sub-section 5, which provides for attaching parcels of land forming a union school section to other sections upon the dissolution of the union, applies to a case like the one before us, where there was a school section from which territory had been taken by incorporation of a village, such a case being provided for, as I think, if not expressly at least by analogy, by the sections to which I have referred.

If I am right in the view that I have formed, the objections to the award fail.

It is not, of course, for me to consider the fairness of the result or review the evidence. I have only to consider the exercise of the powers of the arbitrators, or the refusal to exercise the powers conferred upon them.

In my opinion, therefore, the motion fails and must be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

CALLAGHAN V. HOWELL.

Will—Devise of Real Estate—Payment of Legacy out of Annual Produce—Charge—Purchase Money—Indemnity.

A testator, after a bequest of a legacy to the plaintiff, amongst others, devised to a daughter "my two farms," describing them, and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered. The daughter took possession of the whole estate, paid the debts and received the rents and profits of the farms which she subsequently mortgaged and they were sold by the first mortgagee, under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee:—

Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the farms, and that the charge was not affected by the subsequent words, "or" as to the executors "should seem best"; that the fact that sufficient annual produce of the farms had been received which if set apart would have paid off the legacy was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her possession and receipt, and her grantees or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed until payment of the legacy with interest not exceeding six years' arrears, that the balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that subject thereto the subsequent mortgagee was entitled to it.

Decision of ROBERTSON, J., varied.

THIS was an action tried before ROBERTSON, J., at the Belleville non-jury Sittings on December 16th, 1896, and was brought to have it declared that a legacy of \$600, bequeathed by one Michael Doyle, now deceased, to the infant plaintiff, who was his grand-daughter, was a charge on certain lands of which he died seized and which he by his will dated 25th January, 1888, devised to his daughter Margaret Doyle (now Margaret J. Brennan). Statement.

The testator died in the month of February, 1888, without having in any way revoked his will, to which he appointed two executors.

The will was in the following words:—

"In the name of God, Amen. I Michael Doyle, being of sound mind but weak in body, do hereby make this my last will and testament.

Statement. I give and bequeath to my niece Catherine Howell, the sum of one thousand dollars.

I give and bequeath to my grand-daughter Mary Jane Callaghan, the sum of six hundred dollars.

I give and bequeath to my sister Catherine Murphy, of Lambton, the sum of one hundred dollars.

I give and bequeath forty dollars to the Rev. Michael Mackey, for masses for myself and family.

I give and bequeath to my daughter Margaret Doyle, my two farms, namely, parts 31 and 32 South Range, 5th concession Tyendinaga, containing ninety acres, and lot 33 North Range, 4th concession Tyendinaga, containing eighty acres. All my personal property and all property of whatsoever kind I may die possessed of. And in case my said daughter Margaret Doyle should marry, I desire that she shall have the property for her sole and separate use.

I appoint James Farrell, and Dennis Nealon, both of the township of Tyendinaga, my executors; and I desire that they shall pay the above legacies out of the annual produce of the farms, or as to them shall seem best.

Dated this 25th day of January, in the year of our Lord, 1888."

The executors renounced probate, and the daughter took possession of the whole of the estate, real and personal, and paid all the debts.

The will was registered in the proper registry office on 15th February, 1888.

At the time of the death of the testator the plaintiff was seven years old.

On the 8th June, 1893, the daughter and devisee mortgaged the lands to one Charles H. Elliot, to secure the repayment of \$1,350 with interest at six per cent., payable in five years, interest annually; with the proviso that in case of default of payment for three months, the mortgagee on giving three months' notice might enter on and lease or sell the lands.

Afterwards, on 5th September, 1893, the daughter and

devisee again mortgaged the lands to one Wm. P. McMahon, to secure the repayment of \$650, with interest at ten per cent., principal payable in five equal instalments ; with a proviso as to sale, in case of default. On 20th January, 1894, McMahon assigned his mortgagee to the defendant Thompson. In March, 1894, the defendant Martin recovered a judgment against Margaret J. Brennan for \$585. 46 and placed a writ of execution against lands in the hands of the sheriff. In November, 1894, Elliott, the mortgagee first named, took proceedings under the power of sale in his mortgage, and ultimately, on the 9th May, 1896, the lands were sold to the defendant Andrew Howell in consideration of \$2,610, and were conveyed to him. Statement.

The defendant Martin's execution remained unsatisfied. The mortgage money and expenses of sale due to Elliot, the mortgagee, were deducted from the sale moneys and there remained a surplus of \$805.13, whereupon defendant Howell applied to the Court and obtained leave to pay this surplus into Court. Subsequently the defendant Martin made an application to have said amount paid out to him, or a part thereof, in satisfaction of his execution. Upon this application the plaintiff, the defendants Andrew Howell, Thompson, Martin and McMahon, appeared. Andrew Howell contended that the claim of the plaintiff should be satisfied out of the money in Court and not out of the lands, while the defendants Thompson, Martin and McMahon, contended that the plaintiff's claim, if any, should be satisfied only out of the lands and not out of the money in Court, inasmuch as her legacy, if a charge on the lands, was a charge thereon prior to any title acquired by defendant Andrew Howell on the conveyance from the mortgagee Elliot. The application of Martin was enlarged by consent of all parties interested, and with the concurrence of the Official Guardian, upon the understanding and arrangement that this action should first be disposed of, in order that the questions at issue herein and the construction of the will should be determined.

Statement. Nothing was alleged in regard to the other legacies mentioned in the will, except that the legatee, Catherine Howell, had accepted five promissory notes of \$200 each representing her legacy of \$1,000, on which she subsequently recovered a judgment for \$1,329.25, since the commencement of this action, and her execution still remained unsatisfied in the hands of the sheriff against the lands of Margaret Brennan, and she claimed some interest in said lands so devised to Margaret J. Brennan or on the fund in Court.

The defendant McMahon disclaimed, alleging that he had assigned his interest to the defendant Thompson.

Clute, Q.C., and Morden, for the plaintiff.

Masson, for the defendant Andrew Howell.

Lyons, for the defendant Martin.

W. H. Biggar, for the defendant Thompson.

Macaulay, for the defendant Catherine Howell.

May 31st, 1897. ROBERTSON, J.:—

The question is, whether the legacies mentioned in said will are charged upon the said land so devised to said Margaret?

The will bears date on 25th January, 1888, and was, therefore, since the passing of the "Act respecting the Devolution of Real Estate," R. S. O. 1887 ch. 108 (49 Vict. ch. 22).

The executors in no way intermeddled with the estate, but the devisee took possession of the lands, and all the personal estate, and thereby became executrix *de son tort*.

In *Robson v. Jardine* (1875), 22 Gr. 420, the testator gave to his wife for life all his real and personal estate, and after her decease the real estate to be divided equally between his daughter Annabella and his son Dugald; and he then gave certain legacies to his other children and grandchildren and declared all of the above payments or legacies to be paid to the respective parties by his daughter Annabella

and his son Dugald "to whom my real estate aforesaid is bequeathed."

Judgment.
Robertson, J.

Blake, V.-C., said at p. 424: "I think the cases warrant the conclusion that, where a testator gives real estate to one whom he directs to pay a legatee named in the will a sum of money and the devisee accepts the devise he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of this obligation. In this manner the legatee obtains a charge on the realty claimed by the devisee, which the legatee can enforce in this Court."

In the case *sub-judice*, there is no time mentioned for the payment of the legacies, and although the words are that the executors are to pay them out of the "annual produce of the farms," there is a discretion expressed, "or as to them shall seem best." Unfortunately the executors named did not take out probate; had they done so under the Devolution of Estates Act, the whole of the estate, real as well as personal, would have devolved upon and become vested in them, and in that case the legacies would have been payable out of the real estate by mortgage or sale of it, had the executors thought it best to raise the amounts in that way. But, instead of that happening, the devisee, to whom the residue of the estate after the payment of the legacies was devised, took possession of the whole and afterwards having mortgaged all the lands, under which mortgage they were sold, the legatees cannot by such means be deprived of the bounty of the testator. It follows then that the first mortgagee, Elliot, took the mortgage subject to the legacies, and the purchaser under that mortgage took no better or greater interest than his vendor.

The legacy of the defendant Catherine Howell stands in the same position as the plaintiff's, and she is entitled also to look to the lands for satisfaction of her legacy, and the costs incurred by her in this action; but I do not think she is entitled to her costs in the action on the five promissory notes given by Margaret Brennan to her for the

Judgment. amount of such legacy. She should have taken proceedings such as the plaintiff has in this action, and not sued upon the promissory notes. I do not think she has lost her remedy for the legacy against the land. She has her execution still against Margaret Brennan, out of whom she may make such costs, for which the defendant Andrew Howell as purchaser of the land is not responsible.

Robertson, J.

In this view of the case the plaintiff and the defendant Catherine Howell are entitled to be paid *pari passu* out of the moneys in Court, to the extent thereof, and the deficiency, including the plaintiff's and defendant Catherine Howell's costs in this action, after taxation, is to be satisfied out of the lands to be sold under the direction of the Master at Belleville.

In regard to the other defendants who hold subsequent mortgages and judgments against Margaret Brennan, they have no rights, unless the equity of Margaret Brennan in the lands exceeds the amount of the legacies and the mortgage under which defendant Andrew Howell purchased.

The defendant Andrew Howell says, *inter alia*, that the legacy of the plaintiff, if a charge upon the said property at all, was only a charge on the annual produce of the said farm, and that the plaintiff resided with the said Margaret (who is her aunt) and the defendant Andrew Howell upon the said premises, and received her support and maintenance thereon for a considerable time, and that she should be charged with the said maintenance and support, as against her said legacy.

The facts in regard to this are, that the plaintiff whose mother had predeceased the testator and who, at the time of his death was in the seventh year of her age, had been living with the testator as a member of his family, and continued with her aunt Margaret, the devisee, on the farm at the aunt's request, who had a warm affection for the child, and to whom, as Catherine Howell said in her evidence, her "heart went out." Some time after the death of the testator the father of the child married again, and

then both he and his wife took the child home with them, Judgment. where she remained for some time. Her father was taken Robertson, J. ill and she was taken ill and was sick at the same time, and there still existing a warm affection between the aunt and the child, the aunt went for her, and she was allowed to return to what had been her home since she was an infant. She afterwards returned to her father's home, who was able to maintain her comfortably, and did so until he died, after which his widow, the step-mother, wished that the child should remain with her, as she had become fond of her, but the aunt was anxious to have her back and she ultimately went to her and remained for a time. On the evidence I find that there never was any intention to charge the child for her maintenance while she lived with her aunt on the farm; nor do I think that any charge could be made as against this legacy. The father of the child was able to support her and would much rather have had her with him, and so would his wife, her step-mother, but, owing to the mutual affection which existed between the aunt and her, she was allowed to remain for a considerable time with the aunt, after the testator's death. I think, therefore, on taking the accounts as hereinafter provided for, no allowance is to be made to the defendant Andrew Howell, nor any charge for such support and maintenance against the legacy of the plaintiff.

From this judgment the defendant Uriah Elliott Thompson, the assignee of the second mortgage, appealed to a Divisional Court, composed of MEREDITH, C. J., ROSE and MACMAHON, JJ.

On January 12th, 1898, the appeal was argued.

W. H. Blake, for the appellant.

Clute, Q.C., for the plaintiff.

Masson, for the defendant Howell.

The other defendants were not represented.

Judgment. February 14th, 1898. MEREDITH, C. J.:—

Meredith,
C.J.

The first question depends on the effect of the will of Michael Doyle, which is dated 25th January, 1888, by which a legacy of \$600 was bequeathed to the plaintiff which she claims to be charged upon the lands devised by the will to the testator's daughter, Margaret Doyle, and by the judgment appealed from effect has been given to her contention.

The will is in the following terms: [The learned Chief Justice then set out the will.]

The language of the testator is plain and simple, and the scheme of his will reasonably clear, and unless upon the application of some rule of law or canon of construction which prevents that being done, there ought to be little difficulty in giving effect to what he has directed to be done.

No doubt had the will stopped without the provision being made, which is made, as to the fund out of which the legacies are to be paid, the personal property being the fund out of which they are by law to be met, the provision for the pecuniary legatees which the testator intended to make would, to the extent to which the personal property should prove insufficient to pay the legacies, have failed. But the testator intended to prevent that happening, and has therefore made provision for payment of the legacies out of the annual produce of the farms, which plainly means the farms which by the preceding paragraph of the will he had devised to Margaret Doyle.

Why should not effect be given to the direction which the testator has made as to the disposition of his property?

Three objections are urged which it is said are fatal to the plaintiff's claim: (1) The charge, if charge it be, of the legacies is a general charge, and therefore does not affect the property which is by the preceding provisions of the will specifically devised; (2) there is no estate given to the executors who are directed to pay the legacies out of the annual produce of the farms; (3) a gift of the annual produce of land does not create any charge.

There are, as it seems to me, complete answers to each of these objections.

Judgment.

Meredith,
C.J.

As to the first,—the charge, if charge it be,—is, not a general charge on the testator's estate or his property, in which case only does the rule invoked by the appellant apply; the charge of the legacies is a direct and specific one on a particular part of the testator's property,—the annual proceeds of the farms devised to Margaret Doyle,—and although the devise and bequest to her is not in terms made subject to the charge, it is nevertheless subject to it, and the charge is to be treated as an exception out of it. It is our duty in construing the will to give effect to every provision of it, if that can be done without violating some rule of law or canon of construction. Is there either to prevent the charge created by the will taking effect? I know of none. Had the devise to Margaret Doyle been followed by a devise of the farms to another for life, beyond question both dispositions would have been effectual, and the devise to Margaret Doyle would have been cut down to a remainder in fee expectant on the life estate given to the other devisee; and it can surely make no difference in the efficacy of the gift that the subsequent interest given is less than a life estate: Jarman on Wills, 5th ed., 439.

Then as to the second objection, there being a direction to the executors to pay the legacies out of the annual produce of the farms, it is necessary that they should take some estate in the farms to enable them to do what they are directed to do, and therefore, upon a well-known principle of construction, they take by implication such an estate as is necessary to enable them to do what the testator has directed them to do, and that estate being given is excepted out of what has been devised to another beneficiary where, as in this case, the fund is to be provided out of what is given to that beneficiary: *Oates v. Cooke* (1765), 3 Burr. 1685; *Doe d. Beezley v. Woodhouse* (1790), 4 T. R. 89; *Anthony v. Rees* (1831), 2 Crompt. & J. 75; *Ex p. Wynch* (1854), 5 DeG. M. & G. 188, at p. 221; *Parker v. Tootal*

Judgment. (1865), 11 H. L. 143, at p. 161; Jarman on Wills, 5th ed., p. 494.

Meredith,
C.J.

The plaintiff's position in this respect is, I think, strengthened by the provisions of the Devolution of Estates Act, because by those provisions the lands of the testator vested in his personal representatives, and they have, therefore, the necessary estate in them to enable them to carry out the direction of the testator as to the application of the annual produce of the farms, and they would not, I apprehend, be required to convey to the specific devisee until that duty had been discharged.

The third objection is founded on what seems to me to be a misapprehension of the cases on which it was based. It is quite true that while a charge on the rents and profits of land creates a charge on the land and authorizes a sale of it, a charge on the annual rents or annual produce of land does not authorize a sale. The reason of that distinction is plain. A charge on the annual profits or produce indicates an intention that that which is charged on them is payable out of them as they are received yearly, and is, therefore, inconsistent with a right to sell the corpus for payment at once of the amount of the charge. If the argument in support of the objection were well founded, had the devise to Margaret Doyle been made expressly subject to the payment of the legacies out of the annual produce of the farms, it must have failed to affect the farms, which seems to me a *reductio ad absurdum*.

Thus far I have not referred to the words "or as to them shall seem meet," which follow the direction to pay the legacies out of the annual produce of the farms.

It is not, I think, necessary to consider what the exact effect of these words may be. It is sufficient for the purposes of this case to say that they appear to me too indefinite to create a charge on the corpus, or to extend the charge so as to affect more than the annual produce of the farms, and too indefinite also to deprive the legatees at the will of the executors of the benefit of the fund directed to be created from the latter source for payment of the legacies.

There remains to be considered the question whether the annual produce of the farms from the death of the testator to the extent that it, if applied or set apart year by year for that purpose, would have been sufficient to satisfy all the legacies given by the will, and that only is the fund out of which the legacies are to be paid, so that, as has happened in this case, the failure of the executors to get in the annual produce from year to year, has operated to deprive the plaintiff of the right now to look to the annual produce of the farms in the future for the payment of her legacy and interest.

Judgment.
Meredith,
C. J.

I am unable to see why the will should be so construed as to effect that result. The annual produce of the farms is the source from which the legacies are to be paid. The plaintiff's legacy has not been paid; and I do not see how the devisee of the farms could raise the objection, she having been allowed to enjoy the produce of the farms, and if she could not, why her grantees or mortgagees should be in a better position to do so.

In *McCarthy v. McCartie*, [1897] 1 Ir. R. 86, 112, affirmed by the House of Lords, *sub nomine*, *Bank of Ireland v. McCarthy*, [1897] W. N. 164*, legacies charged upon the real estate, if the personal estate should be insufficient to pay them, were held to be subsisting charges on the real estate, although at the time of the death of the testator his personal estate was sufficient to pay them. The facts of that case seem to me to be stronger against the pecuniary legatee than the facts in this case are against the plaintiff. There, the charge was in form at all events conditional, and yet the legatees were held to be entitled to resort to the land, although the primary fund for their payment was originally sufficient to pay the legacies. Here the charge is not conditional in form but absolute, and the failure to apply the annual produce of the farms and recourse being had to it now has worked no injustice upon the devisee of the farm or those claiming under her. The

* Since reported [1898] A. C. 181.

Judgment.
Meredith,
C.J.

reasoning of Lord Justice Walker, and the cases referred to by him in support of his conclusion, I think, warrant our holding that, in this case, the annual produce of the farms was applicable to the payment of the legacies, and the failure of the executors to apply the annual produce year by year was no more than the devastavit as to the personal estate in the cases referred to, which was held not to deprive the legatee of the right to resort for payment of her legacy to the real estate upon which it was charged in aid of the personal estate.

I am of opinion, therefore, that the legacy to the plaintiff remains a charge upon and is payable out of the annual produce of the farms; but her right to interest upon the legacy must be limited so that she does not receive more than six years' arrears before action and subsequent interest; and as there is no right to require a mortgage or sale of the corpus to satisfy her claim, beyond a declaration of her rights, the extent of the relief to which she is entitled is by the appointment of a receiver of the annual produce of the farms; but the appointment of a receiver is probably unnecessary as the parties will no doubt agree upon a reasonable sum to be paid annually by the defendant Howell in discharge of the plaintiff's claim.

The appellant, however, claims that the moneys paid into Court, and which represent the proceeds of the sale of the farms after satisfying a mortgage of one Charles H. Elliott, the farms having been sold by him to the defendant Andrew Howell under the power of sale contained in his mortgage, should be paid to the appellant as second mortgagee. His argument is that the lands having been sold under Elliott's mortgage, which was subsequent in priority to the plaintiff's charge, the purchaser Howell was not entitled to have the charge satisfied out of his purchase money, and, at all events, having paid the moneys into Court and therefore, as contended, having relinquished all claim to them, he is not entitled to have them applied in paying off the charge, and that the judgment of my brother Robertson, which provided for that being done, was erroneous.

This contention also in my opinion fails. The moneys paid in Court were paid in on the application of both the mortgagee and the purchaser, and in the affidavit of the mortgagee, in support of the application, it is stated that the purchaser refuses to pay the balance of his purchase money on the ground (among others) of the existence of or alleged existence of the charge in favour of the plaintiff created by the will, and one of the reasons for payment in is stated to be that the purchaser desires to be relieved of "responsibility" to the plaintiff. The purchaser contracted to buy not the mortgagee's interest in the land but the land itself, and was clearly entitled as against his vendor to have his purchase money applied in discharge of the plaintiff's prior charge, or to be indemnified out of the purchase money against it; and the Court is asked by the plaintiff to allow itself to be used to commit what, under the circumstances in which the payment into Court was made, would amount to a fraud upon the purchaser, for that would not be too harsh a term to apply to the act of one who should receive a purchaser's money in order that he might protect a purchaser against a prior charge on the land purchased, and then should pay it over entirely disregarding that purpose, and so as to deprive the purchaser of the right, which he had at the time the money was paid to the depository of it, of applying it to protect himself against the claim.

Judgment.

Meredith,
C.J.

The result is that the plaintiff is entitled to judgment declaring that the legacy to her is charged upon and payable out of the annual produce of the farms, with interest thereon, not, however, to extend to arrears for more than six years before action; and that she is entitled to have a receiver appointed of the annual produce for the satisfaction thereof; and it should be declared that the moneys in Court are to stand as a security and indemnity to the defendant Howell against the claim of the plaintiff, and that they from time to time be applied and paid out to him to the extent to which he may be called on to pay the annual produce of the farms to the plaintiff on account of

Judgment. her claim ; and that, subject to that right of the defendant
Meredith, Howell, the appellant is entitled to the moneys in Court.

C.J. The judgment pronounced after the trial will be varied accordingly. The plaintiff's costs up to and including the trial will be added to her claim, and there will be no costs to any of the parties of the appeal.

ROSE and MACMAHON, JJ., concurred.

G. F. H.

CHAPIEWSKI V. CAMPBELL ET AL.

*Crown Lands—Free Grant and Homestead Act—Sale of Trees by Locatee
—Validity of—Subsequent Issue of Patent to Vendor—Estoppel.*

A locatee of free grant lands under 38 Vict. ch. 8 (O.), (R. S. O. (1877) ch. 24), who has, contrary to the provisions of section 10 of the Act, sold the pine trees on the land before the issue of the patent, is not, nor is anyone claiming under him, after its issue, estopped from denying the validity of the sale.

THIS was a motion to continue an injunction granted by Statement.
a local Judge to restrain the defendants, a firm of lumbermen, from cutting timber on the plaintiff's land which was by consent of counsel for all parties turned into a motion for judgment on the affidavits.

It appeared that one Lawrence Plecaski on September 2nd, 1876, became the locatee of lot 9 in the 7th concession of the township of Sherwood in the county of Renfrew, which was free grant land subject to the provisions of 31 Vict. ch. 8 (O.), afterwards embodied in R. S. O. 1877 ch. 24: and on June 27th, 1882, by agreement in writing he granted, bargained, sold and assigned to one Hugh McLachlan all the trees and timber then on said lot with full liberty, power and authority to take, cut and manufacture the same at any time, which agreement was registered on March 9th, 1886, and was assigned to the defendant on February 11th, 1898.

The patent was issued to Plecaski on March 10th, 1885, by which under the Act all trees remaining on the land passed to the patentee.

On August 6th, 1891, Plecaski and his wife by deed of bargain and sale conveyed to one John Paplinski, who in the same manner on March 8th, 1892, conveyed to the plaintiff.

Both deeds were for valuable consideration and were duly registered.

The motion was argued in Weekly Court on February 16th, 1898, before FALCONBRIDGE, J.

Argument.

J. H. Moss, for the motion. The land having been located in 1876 is governed by the provisions of 31 Vict. ch. 8 (O.), now contained in R. S. O. 1877 ch. 24. The trees remain the property of the Crown save certain exceptions: section 10. All trees pass to the patentee: section 10, sub-sec. 2. No interest in the land can be alienated previous to the issue of the patent, save by devise: section 14. The issue of the patent vesting the trees in the patentee does not estop him from denying his own right to sell them previously. The intention of the Legislature is to prevent the cutting of timber before the issue of the patent: *Hughson v. Cook* (1873), 20 Gr. 238; *Langmaid v. Mickle* (1888), 16 O. R. 111. In *Hutchinson v. Beatty* (1876), 40 U. C. R. 135, the sale was only held good by virtue of a special statute. See also *Brown v. Cockburn* (1876), 37 U. C. R., at p. 600; *Shairp v. The Lakefield Lumber Co.* (1890), 17 A. R., at p. 332; *S. C.* (1891), 19 S. C. R. 657; *Parker v. Maxwell* (1887), 14 O. R. 239. The doctrine of estoppel does not apply in the case of an express prohibition against alienation: *Doe d. Tiffany v. McEwan* (1837), 5 O. S. 598, per Robinson, C.J., at p. 606. To give full effect to the doctrine of estoppel as laid down in *Doe Irvine v. Webster* (1849), 2 U. C. R. 224 would be to defeat the provisions of the statute and to override all the wife's interests under sections 15, 17 and 18.

E. T. English, contra. It is true the grant of the timber was made by a mere locatee, but he afterwards became the patentee, so the plaintiff's rights are no higher than his, and although the grant might not have been effectual when it was made, the issue of the patent feeds the estoppel and prevents the plaintiff questioning the defendants' rights: *Doe d. Hennesy v. Myers* (1832), 2 O. S. 424; *Doe d. Tiffany v. McEwan* (1837), 5 O. S. 598; *Burns v. Burns* (1874), 21 Gr. 7. The effect of section 14 of the Act is merely to take away from the locatee any right to deal with his location before the issue of the patent. The locatee could not have repudiated his grant when the

patent was issued to him and could not bring an action **Argument.** against his grantee to account for any timber cut. Section 15 only applies to transactions after the issue of the patent. The defendants' rights are founded upon a valuable consideration paid to the plaintiff's predecessor in title and the plaintiff is estopped from denying them: *Hutchinson v. Beatty* (1876), 40 U. C. R. 135; *Brown v. Cockburn* (1876), 37 U. C. R. 592; *Shairp v. The Lakefield Lumber Co.* (1890), 17 A. R. 322; do not apply.

March 19, 1898. FALCONBRIDGE, J.:—

The arguments on this motion were handed in to me. The circumstances of the case, regard being had to the season of the year, demand an immediate adjudication which I give on first impression of the statute R. S. O. 1877 ch. 24, and of the cases cited.

The statute in question appears to me by construction and manifest intention to forbid the application of the doctrine of estoppel being fed by the issue of the patent.

Judgment for the plaintiff with costs.

G. A. B.

[DIVISIONAL COURT.]

CUNNINGTON V. PETERSON ET AL.

Bills of Exchange and Promissory Notes—Addition of Maker's Name—Non-apparent Alteration—Holder in Due Course—58 Vict. ch. 33, sec. 63 (D.).

In an action on a promissory note against several parties as makers it appeared that the name of one of the alleged makers was not signed by him or with his authority but was added to the note after some and before others of the makers had signed it before the note came to the hands of the plaintiff, a holder for value :—

Held, that the plaintiff being the holder of the note in due course and the alteration not being apparent he could avail himself of it as if it had not been altered under the proviso to sec. 63 of the Bills of Exchange Act 1890, 58 Vict. ch. 33 (D.).

Reid v. Humphrey (1881), 6 A. R. 403, distinguished.

Statement. THIS was an appeal from the County Court of the county of Waterloo in an action on a promissory note.

It appeared that the name of one Nicholaus Dietrich which was on the note as one of the makers was not signed by him or with his authority and that it had been signed before the note came to the hands of the plaintiff, a holder for value, and it was contended that the addition of his name after the note had been signed by others of the makers was such a material alteration as invalidated it.

The County Judge dismissed the action as against Dietrich but gave judgment in favour of the plaintiff against the other defendants.

From this judgment those defendants appealed and the appeal was argued on March 10th, 1898, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.

W. M. Douglas, for the appeal contended that the addition of the name after the signing of the note by the appellants was a material alteration and invalidated the whole note under sec. 63 of The Bills of Exchange Act,

1890, 58 Vict. ch. 33 (D.), and cited *Carrique v. Beaty* Argument. (1897), 24 A. R. 302; *Reid v. Humphrey* (1881), 6 A. R. 403; *Ex. p. Edward Yates*; *Re Tilden Smith* (1857), 2 D. & J. 191; *Swaissland v. Davidson* (1882), 4 O. R. 320; *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84; *Suffell v. The Bank of England* (1882), 9 Q. B. D. 555.

E. G. Graham, contra, contended that as the alteration, if any, was not apparent and as the plaintiff was a holder in due course, the validity of the note was not affected and the plaintiff was entitled to recover under sub-sec. 1 of sec. 63 of the Bills of Exchange Act, 1890.

April 5, 1898. The judgment of the Court was delivered by

ARMOUR, C.J. :—

The note, a joint and several one, sued upon in this action purported to have been made by all the defendants payable to Dygert Brothers and by Dygert Brothers endorsed to the plaintiff who became "the holder thereof in due course" within the meaning of the Bills of Exchange Act, 1890.

The defendants Good and Hahn apparently did not defend the action; the defendant Nicholas Dietrich denied that he made the note and the other defendants set up amongst other things that R. J. Dygert one of the firm of Dygert Brothers materially changed and altered the said note by forging the name of the defendant Nicholas Dietrich thereto and the same was thereby avoided.

The plaintiff did not at the trial attempt to prove the signature of the defendant Nicholas Dietrich to the note and was at the close of his case non-suited as to the defendant Nicholas Dietrich, and thereupon the defendant Nicholas Dietrich was called as a witness on behalf of the other defendants and denied that he signed the note and that he ever authorized any one to sign it for him.

There was no evidence that as alleged R. J. Dygert forged his name, nor as to how his name came to be signed

Judgment to the note nor when, but it clearly appeared that it was signed to the note when the plaintiff became the holder of it.

It is somewhat singular if the Nicholaus Dietrich, the defendant in this action, is the same Nicholaus Dietrich whose name was signed to the note and the signature was not made or authorized by him that on the same day the note was given, Dygert Brothers to whom the note was given, should have by bill of sale transferred the horse for part of the price of which the note was given to Nicholaus Dietrich among others, purchasers of the horse.

And the defendant Nicholaus Dietrich swore that he was approached in the spring of 1895, by Dygert, in connection with the sale of a horse but he never became a member of the syndicate in purchasing the horse.

If the name of the defendant, Nicholaus Dietrich, was signed to the note neither by him nor by his authority, the question arises whether the plaintiff can recover against the other makers of the note and this was the only question argued before us.

This case differs from the case of *Reid v. Humphrey* (1881), 6 A. R. 403, for there the name of the payee, David Pickle, was added as a maker after the note had been completed and issued and the inference was, if the evidence of Pickle was believed, that his name was added by the holder or while in the custody of the holder; while in this case the name of the defendant Nicholaus Dietrich was signed to the note during the completion of it after five of the defendants had signed it and before other two of the defendants had signed and before it was issued, and it is clear that the holder, the plaintiff, did not sign it, and I do not think it fair from the evidence to conclude that either of the payees did it, and the inference I draw from the evidence is that if the defendant Nicholaus Dietrich neither signed it nor authorized the signing of it, some person signed it not with intent to defraud but believing that he had the authority to sign it for the defendant Nicholaus Dietrich.

Under these circumstances it may admit of considerable doubt whether this was a material alteration which avoided the note or whether it was an alteration at all: *Judgment.*
Doe d. Lewis v. Bingham (1821), 4 B. & Ald. 672. That part of the second resolution in *Pigot's* case, 11 Rep. 26b., which declares that an alteration in a point material by a stranger avoids a deed has not been followed in the United States: Daniel on Negotiable Instruments, 4th ed., par. 1373a., and seems not to be concurred in by Lord Herschell: see *Lowe v. Fox* (1887), 12 App. Cas. 206, at p. 217. *Armour, C.J.*

But it is unnecessary for us to determine whether this was an alteration of the note sued on or not, or whether or not it was a material alteration of the note for we are of the opinion that the plaintiff being the holder of the note in due course and the alteration not being apparent may avail himself of it as if it had not been altered, under the proviso to sec. 63 of the Bills of Exchange Act, 1890.

It was contended that this proviso did not include an alteration by the addition of a name as maker to a note but this proviso was passed for the protection of holders in due course and we cannot so restrict the generality of its terms.

In *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84, Denman, J., in commenting upon this proviso, at p. 90, said: "By the word 'apparent' I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an, apparent, one, even if it is not an obvious one to all mankind."

But this was not necessary to the decision of the case and would do away altogether with the benefit to the holder in due course designed by the proviso, and was not followed in the much litigated case of *Scholfield v. The*

Judgment. *Earl of Londesborough*, [1894] 2 Q. B. 660, [1895] 1 Q. B. Armour, C.J. 536, [1896] A. C. 514.

The appeal must be dismissed with costs.

G. A. B.

IN THE MATTER OF AN ARBITRATION BETWEEN THE
CORPORATION OF THE TOWN OF CORNWALL
AND
THE CORNWALL WATER-WORKS COMPANY.

Water-works Companies—Municipal Corporation—Arbitration to Determine Value—Notice to Mortgagees—Value of Works—Interest.

The omission to serve notice on the mortgagees of a water-works company, of arbitration proceedings under R. S. O. (1887) ch. 164, to determine the amount to be paid by a municipality for such works and property, the mortgagees not being parties thereto, and in which the award made was less than the amount of their claim, does not entitle the company to have such award referred back, and the mortgagees made parties, as their rights could not be affected thereby.

In such an arbitration the arbitrators are simply to value the existing property of the company at the sum it would cost to erect the works and purchase the property, allowing for wear and tear, and perhaps for outlay of a necessary experimental character, but they are not to make any allowance for future profits or for the taking away from the company the right to supply water at a profit.

Interest is allowable on outlay during the construction of the works, but not on the cost of construction after completion and while the annual revenue of the company is less than the annual expenditure.

Statement. AN arbitration was held between these corporations under the 98th and following sections of R. S. O. 1887 ch. 164, to determine the amount to be paid by the town corporation to the Water-works Company for their works and property.

The arbitrators determined the present value of the
works and property to be..... \$78,628 85
and adding the statutory percentage. 7,862 88

fixed the amount to be paid at.....\$86,491 73

From this award the Water-works Company appealed upon various grounds which are set out in the judgment of STREET, J., before whom the appeal was argued on 23rd September, 1897, and the 2nd March, 1898. Statement.

Aylesworth, Q.C., and *Cline*, for the Water-works Company.

Leitch, Q.C., and *E. D. Armour, Q.C.*, for the town.

Bruce, Q.C., appeared for certain mortgagees who were not parties to the arbitration and who had been served with notice of the appeal proceedings.

March 29th, 1898. STREET, J. :—

The first ground of appeal argued was that the proceedings of the arbitrators were invalid by reason of the fact that the mortgagees of the property were not notified and were not in any way parties to the arbitration.

It appeared that in September, 1886, a mortgage had been made by the Water-works Company to the Farmers Trust Company of New York, of all their works and property to secure an issue of first mortgage bonds amounting to \$80,000, with interest at 6 per cent. per annum maturing in the year 1906, and that all these bonds are outstanding and unpaid and secured by the mortgage which was duly registered when it was made.

When the appeal was first brought on for hearing an order was made that notice of the proceedings should be served on the mortgagees, and Mr. Bruce, Q.C., appeared before me in obedience to the notice merely to state that his clients had had no notice of the arbitration proceedings: that they were dissatisfied with the amount awarded which would probably be insufficient to satisfy the claims of the bond holders in full, and that they did not consider themselves bound by the award.

The counsel for the town corporation referred to the wording of sec. 101 of R. S. O. 1887 ch. 164, as only requiring notice to be served upon the Water-works Company; and also to sec. 6 of 55 Vict. ch. 38 of the

Judgment. Ontario Statutes for 1892, which provides that the right
Street, J. of a town corporation to acquire the property of a water-works company shall not be prejudiced by the existence of a mortgage, but that the claim of the mortgagee shall be converted into a charge upon the money awarded.

Under sec. 98 of the statute, R. S. O. 1887 ch. 164, the amount to be paid for the property of the Water-works company is to be determined in accordance with the provisions of the Municipal Act. Section 483 of the Municipal Act 55 Vict. ch. 42, Ontario Statutes of 1892, directs that the council shall make compensation for the exercise of its powers to the owners or occupiers or other persons interested in the real property taken, etc., by them; and section 484 of the same Act enacts that certain persons not actually beneficial owners of the entirety of the property taken, shall have power upon an arbitration under the Act to represent the beneficial owners of the whole. There is nothing, however, in this section, nor elsewhere in the Act, which declares that a mortgagor shall have power to represent his mortgagee in such proceedings, and the manifest injustice of permitting him to do so is a very good reason why such a provision is not found in the Act. In the present case if the valuation of the arbitrators is to be taken as accurate and the contention of the town corporation is correct that the mortgagees are not necessary parties to the arbitration, the town corporation and the Water-works Company have been allowed to determine without reference to the mortgagees, that the value of the mortgaged property is insufficient in fact to pay off the bonds. The bonds bear six per cent. and have some nine years yet to run. The money in the hands of the town corporation will hardly produce more than four per cent. and so there will be an annual deficit in interest of \$1,600, aggregating in nine years \$14,400, while the surplus of purchase money to be received by the Water-works Company from the town corporation over and above the face of the bonds is only \$6,491.73.

The injustice of determining the value of their security

behind the backs of the mortgagees and of taking it away from them at a value arrived at without any notice to them, is so apparent that nothing short of the plainest declaration on the part of the Legislature of such an intention would justify any judicial tribunal in committing it. There is nothing in any of the statutes relied upon by the town corporation which compels such a construction and I must hold that it was the intention of the Legislature that the rights of mortgagees should not be affected by anything done in any proceedings to which they were not parties; and that sec. 6 of 55 Vict. ch. 38, is to be invoked only in aid of a corporation having elected to make the mortgagees parties to its proceedings.

Judgment.

Street, J

This objection was specifically raised before the arbitrators at an early stage of the proceedings by counsel for the Water-works Company, and they urged that nothing further could be done until the mortgagees had been made parties. The opposite view was insisted upon by the counsel for the town corporation, and the arbitrators overruled the objection and proceeded with the reference.

I do not think that the circumstances are such as to entitle the Water-works Company to have the question referred back, and to have the mortgagees made parties. If the award had been for a sum sufficient to pay off the mortgagees it is clear that no harm would have been done to any person by their absence, because they would have been paid in full, and the Water-works Company would have had the full benefit of the sum awarded. The case would have been in this regard precisely like that of a contract for the sale of an equity of redemption for an amount not less than the amount of the mortgage: the purchaser would take the equity of redemption and assume the mortgage. Nor can I see that the fact of the amount fixed by the arbitrators as the value of the property being less than the amount of the encumbrances, entitles the Water-works Company to have the award set aside in order that the mortgagees may be parties to a new arbitration.

Judgment.

Street, J.

The position is analogous to that of a vendor who has agreed to sell an equity of redemption for less than the amount of the encumbrance. If the vendor is unable to pay the difference the purchaser may still elect to complete the transaction, assuming the mortgage, and retaining his recourse against the vendor for any surplus he may have to pay to clear it off. The vendor could not be allowed to say that the bargain must come to an end because he was unable to clear the title.

All the other objections to the award, except one of an alleged error in addition amounting to only \$132, seem to fall under the one general head, viz., the principle to be adopted by the arbitrators under sec. 99 of R. S. O. (1887) ch. 164, in determining the value of the works and property of the Water-works Company.

I am of opinion that the arbitrators are required under the Act simply to value the existing property of the Water-works Company, and not to make any allowance for compensation for future profits, or for the taking away from it of the right to supply water to its customers at a profit. The charter of the company was accepted subject to the right of the corporation to acquire it upon paying the value of its works and property at the end of a specified time, and any pretence of a right to compensation for profits is excluded by the language of the Act declaring the basis upon which the sum to be paid is to be arrived at. The arbitrators are not necessarily to be governed by the sum expended by the company in erecting the works and purchasing the property, but they are to fix it at what the company at the time of the arbitration could have erected the works and purchased the property for, making due allowance on the one hand for wear and tear and on the other perhaps for outlay incurred in work of a necessary but experimental character. The line between work of that character, and work which has resulted in no good, or which has been renewed or altered or replaced by other work is in many cases a difficult one to draw. So far as I can gather from a comparison of the manner in which the arbitrators have arrived at their

award, with the evidence given before them, it appears to me that they have endeavoured to draw a distinction such as I have indicated, and they have not refused to allow all outlay upon work which is not at present in use as part of the system. They have besides made an allowance of \$3,500 for contingencies and incidental expenses, and they have allowed interest during construction and engineer's charges for superintending, etc. In the face of the contradictory statements and opinions laid before the arbitrators with regard to such matters as the outlay upon the original canal crossings and the proportion which should properly be allowed of the whole cost of the suction systems, I cannot point to any particular allowance or disallowance and say that it is wrong.

Judgment.
Street, J.

I do not think the Water-works Company have made out an error such as they allege in the quantity of iron piping allowed for.

I think the arbitrators were right in rejecting the claim for interest upon the cost of the works for the period after their completion during which the annual expenses exceeded the annual revenue: that is no part of the cost of construction. An allowance has been made for interest on outlay during the construction of the works, and that I think is as far as they could properly go.

Upon the figures furnished upon affidavit by one of the arbitrators as to the manner in which the amount awarded was reached, the award should be increased by \$132, the result of an error in the addition of the items composing it. The other arbitrators do not, however, concur in this statement, and the counsel for the town corporation refuse to admit that any error has been made. It is possible that the figures given by the arbitrator who has made the affidavit referred to may not be the same as those of the other arbitrators. Under these circumstances I cannot properly interfere by increasing the award at the instance of one of three arbitrators.

The appeal of the Water-works Company must be dismissed with costs upon all the grounds taken.

G. F. H.

GIBBONS V. COZENS.

Sale of Land—Vendor and Purchaser—Judgment for Balance of Purchase Money—Notice making Time the Essence—Right to Rescind—Forfeiture of Moneys Paid

A vendor who has recovered judgment against the purchaser for the balance of purchase money due on a contract for the sale of land in which time is not of the essence of the contract is not estopped by such judgment from afterwards making time of the essence by notice terminating the contract within a reasonable time on nonpayment of the balance due: *Cameron v. Bradbury* (1862), 9 Gr. 67, followed.

Moneys paid on a contract under such circumstances are forfeited to the vendor who, however, is not at liberty to proceed on the judgment for the balance.

Howe v. Smith (1884), 27 Ch. D. 89; *Fraser v. Ryan* (1897), 24 A. R. 441, followed.

Statement. THIS was an action tried before STREET, J., at the Toronto non-jury sittings on March 14th, 1898.

The plaintiffs were the present trustees under the will of one Matthew Curtis, deceased. In the year 1888 the former trustees under the will contracted to sell to the defendant certain lands on Michipicoten Island in Lake Superior for £5,000 sterling. The purchaser paid a portion of the purchase money on 1st June, 1888, being the date stipulated for payment of the whole and gave security for the payment of the balance at a later date which has long since expired. The vendors then realized upon the security so given by selling it, certain sums which had been applied upon the purchase money, leaving due on 18th February, 1897, £920 16s. 5d. sterling, for principal, and £41 2s. for interest. For this sum they recovered judgment against the defendant on 2nd March, 1896, upon the promise to pay contained in the agreement.

The defendant was in possession of the property, and allowed taxes to the amount of \$2,576.95 to accumulate upon the property which were unpaid.

On 9th April, 1897, the plaintiffs served the defendant with notice that unless the balance unpaid, with interest, were paid on or before 29th May, 1897, his rights would be at an end under the contract and his interest in

the land would be forfeited, and declaring time to be made Statement.
of the essence of the contract.

The defendant paid no further sums in respect of the agreement; and on 13th August, 1897, the plaintiffs began the present action asking for a declaration that the defendant's right to the land under the contract was at an end, and that the registration of it might be vacated or the plaintiffs' right to hold the land freed from the contract might be declared.

The defendant in his statement of defence relied upon the judgment against him for the balance of the purchase money as estopping the plaintiffs from terminating the agreement or from declaring time to be of its essence.

No evidence was given at the trial beyond the documentary evidence, the facts being all admitted.

John Greer, for the plaintiffs.

W. H. Blake, for the defendant.

April 2nd, 1898. STREET, J.:—

I am of opinion that the judgment recovered by the plaintiffs for the unpaid purchase money did not affect their right to terminate the contract in case they were unable to realize the amount of the judgment: *Cameron v. Bradbury* (1862), 9 Gr. 67.

Nor are the plaintiffs bound, as Mr. Blake contended, to return to the plaintiff the payments they have received on the purchase money as a condition or a result of their cancelling the contract. The deposit as well as the payments on account are looked upon as a guarantee that the purchaser will complete his contract and are forfeited if he do not do so: *Howe v. Smith* (1884), 27 Ch. D. 89; *Fraser v. Ryan* (1897), 24 A. R. 441.

The plaintiffs are therefore entitled to the declarations they ask and to the costs of the action; but they must of course provide in the judgment that no further proceedings are to be taken to recover the amount of the judgment for the purchase money unpaid.

G. F. H.

IN RE GEORGIAN BAY SHIP CANAL AND POWER
AQUEDUCT COMPANY.

*Company—Winding-up Order—Proof of Assets—Unpaid Stock—Stock
Issued as Paid Up—Bonds.*

A winding-up order will not be granted where there are no assets, and the petitioning creditor would therefore get nothing by the order. Where, however, on a petition for such an order, which was contested on the ground of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partially paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted winding up the company.

In re Chapel House Colliery Co. (1883), 24 Ch. D. 259, distinguished.

Statement.

THIS was a petition of the Morning Journal Association of the city of New York, U.S., an incorporated company, having its head office in that city, to have declared insolvent the Georgian Bay Ship Canal and Aqueduct Co., a company incorporated under 57 Vict. ch. 97 (O.), as amended by 58 Vict. ch. 117 (O.), and 59 Vict. ch. 111 (O.), and having its head office at the city of Toronto; and for an order to wind up the said company, and for the appointment of a liquidator.

The petition alleged that the petitioners on the 11th January, 1897, had recovered judgment against the said company for the sum of \$1,934.97 on a certain note and cheque, with costs amounting to \$390.59; that on the 16th November, 1897, writs of *fi. fa.* goods and lands were issued and delivered to the sheriff of the city of Toronto, to levy the amount of the said judgment, and interest, and the costs of the levy, but that such writs had been returned *nulla bona*; that nothing had been paid to the petitioners or to anyone on their behalf for or on account of the said judgment, interest and costs, and that the said company were unable to pay its debts as they became due, and were insolvent.

On March 31st, 1898, the petition came on for hearing **Statement.** before STREET, J.

Clute, Q.C., for the petitioners. The facts set out in the petition entitle the petitioners to a winding-up order as a matter of course, as the insolvency of the company has been proved. [The learned Judge was of the opinion that a *prima facie* case was shewn, and called on the other side.]

Aylesworth, Q. C., and *Ferguson*, contra. The creditor is not entitled to a winding-up order as a matter of course on mere proof of insolvency; it must be shewn that the granting of the order would be beneficial to the majority of the creditors, whereas, here, the effect of granting the order would be to paralyze the company, and prevent the majority of the creditors, outside the secured creditors, getting anything, and in fact would be to the prejudice of the great body of creditors, while the non-granting of the order would not in any way affect the secured creditors. In such a case an order will not be granted: *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, at p. 268; *Re Uruguay Central and Hygueritas R. W. Co. of Monte Video* (1879), 11 Ch. D. 372; *Re Krasnapolski Restaurant and Winter Garden Co.*, [1892] 3 Ch. 174; *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278; *Re London Health Electrical Institute*, 13 Times L. R. 208; Emden's Winding-up Practice, 5th ed., 24, 45, 146; 57 Vict. ch. 97, sec. 18 (O.).

Clute, Q. C., in reply. The case of *Chapel House Colliery Co.* referred to on the other side is quite distinguishable, as in that case the company was being worked as a going concern at a profit, and therefore there was a strong argument presented that the effect of the winding-up order would be injurious; and this is the principle laid down in the other cases, and also on the ground that as a matter of fact no benefit could be obtained by granting the order. However, it appears here, that a large quantity of the bonds were realized upon, and it does not appear what has become of the proceeds; and there is also a large amount of unpaid stock which also can be realized upon for the

Argument. benefit of the creditors. Under these circumstances the winding-up order should be granted. He referred to *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355 ; *Re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 57 ; *Re Company or Fraternity of Free Fishermen of Faversham* (1887), 36 Ch. D. 329 ; *Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Ch. D. 769.

April 16th, 1898. STREET, J.:—

This was a petition to wind up the company by a creditor.

It was not contended before me on behalf of the company that it was not insolvent within the meaning of the Winding-up Act, and I think there can not be any doubt whatever of the fact. The argument of the company and the bondholders, in fact, was that its debts were so large and its existing assets so small that no benefit could possibly accrue to the petitioner or any one else from a winding-up order.

The petitioner's debt became due in 1895, and he served the company with writs of summons in that year: proceedings were stayed by arrangement, upon the company agreeing to pay \$200 a month. Default was made in these payments, and judgment was entered on 11th May, 1897, for upwards of \$2,300. Execution was placed in the sheriff's hands on 16th November, 1897, and he has been unable to find any property of the company upon which to levy the amount of the execution or any part of it.

The company contend that the order applied for should not be granted because it has no assets, and that therefore the creditor can obtain nothing by a winding-up. If this were clearly shewn upon the material, then, according to the authority of *In re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, and similar cases, the order should not be made. In the present case, however, the president and secretary of the company have been examined, and although asked to produce the company's books, shewing the moneys re-

ceived upon stock and how they have been disposed of amongst other things, they appear to be unable to do so, and to be to a large extent ignorant of the past transactions of the company, as well as of its operations and present position. The stock book shews that 46,668 shares of the company of \$100 each have been issued and taken, largely as paid-up shares, but there is nothing to shew in what manner they have been paid up, or what has been done with the consideration, if any, received for them. It is stated that the company has handed over \$2,500,000 of its "first mortgage bonds" to another company for value, but the president and secretary are unable to state, or to produce any books shewing, the nature or amount of the value received.

Judgment.
Street, J.

I think, under the circumstances, that I should not say that it is clear the petitioning creditor can find no assets to justify him in proceeding to obtain the order he asks for. A certain amount, at all events, seems to remain unpaid upon stock subscribed for which is only partly paid up, and a very large amount seems to have been issued as paid up without, so far as appears, there being any satisfactory account of the nature of the consideration. Then the bonds that have been issued to such an enormous amount appear to have produced little in the way of results to the company, and it is impossible to say from the evidence before me whether they are held for value or not.

Under these circumstances I think I should not refuse to the petitioner the order for which he asks, and the usual winding-up order will therefore be made.

G. F. H.

[DIVISIONAL COURT.]

REGINA V. HOLMES.

Criminal Law—Criminal Code, sec. 210—Neglect to Support Wife—Former Marriage—Proof of Death of First Husband.

The defendant, on the complaint of his wife, was convicted under sub-sec. 2 of sec. 210 of the Code, of refusing to provide necessaries for her. The evidence shewed the parties were married in 1890, but that the complainant had been married to another person in 1886, though she had never lived with him; that in 1888 she had received a letter stating he was dying in the United States, and that that was the last she heard of him, save that about a year after her marriage to the defendant she again heard that he was dead.

No further proof of the death of the first husband was given:—
Held, that there was evidence to go to the jury of the death of the first husband and that the defendant was properly convicted.

Statement. THIS was a Crown case reserved from the General Sessions of the Peace for the county of York.

The defendant, William Henry Holmes, was charged under section 210, sub-section 2, of the Code, by his wife, Annie Holmes, with unlawfully refusing to provide for her the necessary food, clothing, lodging, and other necessaries, so that the health of the said Annie Holmes was, or was likely to be, permanently injured.

The evidence shewed that the parties were married on the 25th of June, 1890, but that Annie Holmes had been married to one Charles Wheatley on the 24th of July, 1886, and she swore that she had never cohabitated with Wheatley, who was convicted of an offence for which he suffered imprisonment, and that they never lived together either before or after marriage.

The complainant also swore that some time in the year 1888, she received a letter from a person whose name she could not remember, stating that Charles Wheatley was in a hospital in Rochester dying, and asking her to come and see him, which letter was destroyed. This was the last she heard of Wheatley, save that about a year after her marriage to Holmes she again heard that Wheatley was dead.

The defence rested their case solely on the ground that the Crown had failed to prove that the complainant was the wife of the defendant, contending that it was necessary to prove that Charles Wheatley died before the 25th of June, 1890, the date of the defendant's marriage, and that there was no evidence to go to the jury to prove that Charles Wheatley died before that date. Statement.

The defendant was convicted.

The reserved case was whether there was any evidence to go to the jury upon which they could find that Charles Wheatley was dead on the 25th of June, 1890, and that the complainant was the lawful wife of the defendant.

The case was argued on March 7th, 1898, before a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

J. M. Godfrey, for the defendant. The conviction cannot stand. The Crown must prove that the complainant is the wife of the defendant, and to do that must prove the death of the first husband before the date of the second marriage. [ARMOUR, C. J.—Has the first husband been absent seven years? Yes. [Then, if so, and the wife has not heard of him, surely there is no offence. The law is plain in the case of bigamy under section 275, subsection 3 (b), of the Code.] The seven years has expired now, but she married within four years of his going away, and that may apply to prevent a prisoner being convicted of bigamy, but this is a prosecution for non-support of a wife, and the Crown has not proved that she is the defendant's wife. Besides evidence was given to shew that she had heard by letter that the first husband was alive in 1888, within two years before the second marriage, which evidence was mere hearsay and was improperly admitted. Even if the letter had stated the first husband was dead it would not have been evidence. The law may presume death after an absence of seven years, but there is no presumption as to the time of the death, and the Crown should have

Argument. proved that it took place before 1890 : *In re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586 ; *Thomas v. Thomas* (1864), 2 Dr. & Sm. 298.

J. R. Cartwright, Q.C., Deputy Attorney-General, contra. There was sufficient evidence to justify the jury in finding that the first husband was dead and convicting the defendant. He referred to *The King v. The Inhabitants of Twynning* (1819), 2 B. & Ald. 386 ; *The Queen v. Lumley* (1869), L. R. 1 C. C. R. 196 ; *In re Phené's Trusts* (1869), L. R. 5 Ch. 139.

Godfrey, in reply.

The Court was of the opinion that there was evidence from which the jury might have found that Wheatley was dead at the time of the second marriage, and affirmed the conviction.

G. A. B.

ANDREW
V.
THE CANADIAN MUTUAL LOAN AND INVESTMENT CO.

Attachment of Debts—Division Courts—Wrong Primary Debtor—Similarity in Name—Recovery by Rightful Owner—R. S. O. (1887) ch. 51, sec. 195.

In an action to recover a deposit of money to the credit of the plaintiff with the defendants, it appeared that the whole amount had been innocently but wrongfully paid by the defendants into Court and also directly to the creditors of another person of the same name as the plaintiff, under garnishee proceedings in a Division Court:—

Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover, or to protect the defendants against his claim, and that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff:—

Held, also, that sec. 195 of R. S. O. 1887 ch. 51, only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person.

THIS was an action brought by William Andrew Statement.
to recover a sum of money lying to his credit as a deposit with the defendants and which had been paid out by them to creditors of another William Andrew under garnishee proceedings taken and judgments recovered against him, during the absence in a foreign country of the plaintiff, but without any knowledge on the part of the defendants that the creditors of the wrong man were being paid.

The action was tried before STREET, J., at the Toronto non-jury sittings on the 17th March, 1898, who subsequently delivered the following judgment in which the facts appear.

Joshua Denovan, for the plaintiff.

Watson, Q.C., and *A. McLean Macdonell*, for the defendants.

March 19, 1898. STREET, J.:—

The plaintiff was a shareholder in the defendants' company and had been for several years.

Judgment.
Street, J.

When he first took his shares he was living at Cornwall in this Province; from there he moved to Streetsville after a short intermediate residence at another place. After living in Streetsville for about a year he left there on 24th March, 1894, and went to West Plains in the State of Missouri.

Before going to West Plains he wrote informing the defendants of his intention to go there and immediately before his departure he went to their office and informed a clerk at the wicket that he was leaving in the following week and asked to have any correspondence addressed to him at West Plains, Missouri.

During the years 1894 and 1895 he wrote to the defendants upon matters connected with his shares and in October, 1894, and January, 1895, they wrote him in reply three or four letters addressed to him at West Plains, Missouri. An endorsement upon the certificate for his shares notified him to advise the defendants of any change in his post office address.

When he took his shares in the first place his address was entered in the defendants' books as Cornwall. This was afterwards crossed out and Streetsville was entered instead, but no subsequent change was made.

Attached to the certificate of the company shewing that he held the shares in the company were coupons for half-yearly instalments of interest which were collected by the plaintiff from time to time generally through the defendants' solicitors or agents at Cornwall.

In March, 1896, under a by-law of the company the directors exercised an option they possessed of "retiring" the plaintiff's shares, the effect of which was that a sum of \$548.65, representing the value of the shares, was placed to the plaintiff's credit in the books of the company and he ceased to be a shareholder. Both parties agree that this "retirement" was regularly carried out according to the rules of the company.

Upon the day that this was done the defendants' secretary wrote a letter addressed to the plaintiff at Streetsville

notifying him of it, informing him that the amount was at his credit and asking him to return his certificate and draw the money. No reply having been received to this letter a second letter was written to him on 22nd May, 1896, also directed to him at Streetsville, to the same effect. Neither of these letters was ever received by the plaintiff and he remained in ignorance of what had been done.

Judgment.

Street, J.

Shortly before July, 1896, the plaintiff sent to Messrs. Leitch & Pringle, the company's agents or solicitors at Cornwall, the coupon for interest due 1st July, 1896, which the defendants after some demur paid and charged it against the money at the plaintiff's credit in their books reducing it to \$533.65.

It happened that while the plaintiff resided at Streetsville another man of the same name—William Andrew—also lived there, having Streetsville as his post office address. He was not related to the plaintiff nor personally known to him, but the plaintiff was aware of the fact that another man of the same name lived there and in writing to the defendants several times gave his address as "William Andrew, Box No. 550, Streetsville, Ont."

In the year 1894, this other William Andrew (whom I shall call William Andrew No. 2) absconded from this Province and went to live in Winnipeg, leaving behind him a number of unpaid creditors.

By some means or other, probably through the miscarriage of one of the letters written by the defendants to the plaintiff addressed to "William Andrew, Streetsville," the creditors of William Andrew No. 2 were led to believe that the moneys then lying at the plaintiff's credit in the defendants' books were the property of their debtor and they all took proceedings under the garnishee clauses of the Division Courts Act to attach it.

The usual summons to garnishees was served upon the defendants in each case, and in each case the primary creditor was allowed by Judge's order to serve a copy of the summons upon the primary debtor by enclosing it to him in a registered letter addressed to William Andrew,

Judgment. Winnipeg, Manitoba. The defendants being served as
Street, J. garnishees handed all the papers served upon them to their solicitors.

In one of the cases judgment against them had already gone by default before they instructed their solicitors. In the other cases they appeared and stated that they held money at the credit of William Andrew, but urged that they should not be ordered to pay it over to any person until the surrender of the certificate for the shares. The defendants and their solicitors at this time were ignorant of the fact that the primary debtor in these cases was not the man for whom they held the money. No evidence was given and upon their statement that they had money in their books belonging to William Andrew judgment was given by the Judge ordering them to pay it over to the various primary creditors or into Court. \$213.38 of the amount in the defendants' hands was thereupon paid by them into the Division Court in two of the cases and was paid out to the two primary creditors in those cases. The remainder was paid direct by the defendants to the primary creditors in the other cases.

By the end of October, 1896, the defendants had paid out to these creditors of William Andrew No. 2 the whole of the money belonging to the present plaintiff which had been placed at his credit, and his account in their books was closed without a suspicion on the part of the defendants of the wrong that had been done to the plaintiff.

About 12th October, 1897, the plaintiff first became aware of the retirement of his stock and of the disposition made of the proceeds. The defendants refused to pay him any money relying upon the orders of the Division Court as their protection, and in the present action which was begun on 5th November, 1897, they set up these orders and the 195th section of the Division Courts Act, R. S. O. 1887 ch. 51, as their protection.

I am of opinion that there is nothing in these proceedings to bar the plaintiff of his right to recover his money from the defendants or to protect the defendants against

his claim to be paid it. He was not a party to the proceedings relied on by the defendants as protecting them, and the judgments in those proceedings did not apply to money in their hands belonging to the plaintiff, but to money which they erroneously supposed to be in their hands belonging to the other William Andrew: *Farquhar v. The City of Toronto* (1865), 12 Gr. 186, at p. 192; *Re Fair v. Bell* (1878), 2 A. R. 632.

Judgment.
Street, J.

The plaintiff's money is still intact in their hands and they must pay it over to him. The section of the Act upon which the defendants rely only protects them against being called upon by the primary debtor to pay it over again and does not protect them against any third person.

I think it was the duty of the defendants to have informed the plaintiff that the shares had been retired and that the proceeds were at his credit. They wrote him a letter advising him of the fact, but addressed it to his former address of Streetsville, instead of to the address at West Plains, Missouri, which they had been informed by him was his proper address and to which they had in fact directed former letters. They cannot shelter themselves by saying that they had not entered this new address in their books. This question only affects the amount of interest and I think the judgment should be for \$548.65 with interest from 1st April, 1896, less \$15 paid on account.

The defendants must of course pay the costs.

G. A. B.

SINCLAIR V. BROWN ET AL.

Devolution of Estates Act—58 Vict. ch. 21 (O.)—R. S. O. ch. 127, sec. 12—Construction of—Widow's Charge—Quantum of—Foreign Estate.

Under 58 Vict. ch. 21 (O.), now sec. 12 of R. S. O. ch. 127, the widow of an intestate who has left no issue is entitled to \$1,000 out of his real estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

Statement. THIS was an action brought by Mary Sinclair, the widow of Donald Sinclair, who died intestate and without issue on the 21st March, 1896, against Catharine Brown and Annie Corcoran, the only sisters of the deceased, for a declaration that she was entitled under 58 Vict. ch. 21 (O.), to \$1,000 out of his estate notwithstanding the fact that she had received the sum of \$833 called the "Widow's Award" under the law of the State of Illinois out of property which he died possessed of in that State.

The plaintiff and her husband at the time of his death resided in the city of Chicago in the State of Illinois and he died entitled to property both in Canada and Illinois.

The other material facts appear in the judgment.

The matter came up by way of motion for judgment on the pleadings on March 16th, 1898, before ROSE, J.

A. F. Lobb, for the plaintiff.

George W. Lount, for the defendants.

April 1, 1898. ROSE, J. :—

The question for determination is whether under 58 Vict. ch. 21 (O.), now sec. 12 ch. 127 R. S. O. the plaintiff is entitled as the widow of Donald Sinclair, who died intestate and without issue, to \$1,000 charged upon certain real estate left by him situate in this Province,

in addition to a sum awarded to her in accordance with a statute of the State of Illinois and called the "Widow's Award." Judgment.
Rose, J.

The plaintiff and her husband at the time of his death were resident and domiciled in the State of Illinois. He left real estate situate in Illinois and also in Ontario. The personal estate in Illinois was sufficient to pay all debts, funeral and testamentary expenses. Under the statute in force in Illinois there was awarded to the widow the sum of \$833, to realize which it will be necessary to sell the lands in that State. There were no debts in this Province, and no personal estate.

The defendant Catharine Brown obtained letters of administration to the estate in Illinois; the plaintiff obtained letters in Ontario.

I think it is reasonably clear that the intention of the Legislature in passing the 58th Vict. ch. 21 (O.), was to give the widow of an intestate who left no issue \$1,000 in addition to anything that she might by any rule of law be entitled to out of the estate; and that after deducting the \$1,000 the residue was to be dealt with as if it were the whole estate; and the widow's rights in respect to such residue were to be and remain the same as if the \$1,000 had never formed part of the estate, and as if she had not received it from the estate.

If that is the correct view, then the fact that out of the residue of the estate she obtains a portion of the property in Illinois under the "Widow's Award" or otherwise seems to me to make no difference. The lands in this Province descended upon the heirs subject to the charge of \$1,000, and as lands so descending are governed by the laws of the country in which the land is situate and not by the laws of the country in which the deceased had his domicile, I think that the heirs upon whom these lands have descended take them subject to the charge and must pay the \$1,000 or there must be an order for the sale of the lands for the purpose of realizing that sum.

It was objected that proceedings had been taken by the

Judgment.

Rose, J.

plaintiff for administration and for partition. I do not think it is a case at all for administration nor do I think it is a case for partition. I have not to deal with proceedings taken otherwise than in the suit before me, and they must be dealt with independently.

I think, therefore, the order should go declaring the \$1,000 to be a charge upon the lands mentioned in the statement of claim, situate in the township of Nottawasaga, and directing that in default of payment of the \$1,000 with interest thereon from the date of the death of the intestate at 4 per cent. until payment, they shall be sold and that the defendants must pay the costs of the proceedings, which in the event of a sale may be added to the claim and taken out of the proceeds. However, if the proceeds realized from the sale of such lands be not sufficient to pay the \$1,000 and costs, the defendants, to the extent of any deficiency, must pay the costs personally.

I do not name any time within which the \$1,000, interest and costs are to be paid. If the parties cannot agree as to that, I may be spoken to and then will fix a time for payment, and in default of payment within such time the lands must be sold, and for such purpose there will be a reference to the Master at Barrie.

G. A. B.

GLANVILLE V. STRACHAN ET AL.

Bankruptcy and Insolvency—Assignments Act—Ranking on Estate—Valuing Security—Party Primarily Liable—R. S. O. ch. 147, sec. 20.

The provision of sec. 20 of the Assignments Act, R. S. O. ch. 147, that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon," means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security.

The substance not the form of the transaction is to be looked at, to ascertain whether the third party is primarily liable; and if it be found that he is, the debtor is then only secondarily liable.

SPECIAL CASE.

By indenture of the 1st December, 1887, one Turner mortgaged to J. A. Worrell certain lands as security for payment of \$2,100 and interest. Statement.

The principal was afterwards reduced to \$1,050, and a portion of the lands released.

By indenture of the 3rd December, 1887, Worrell assigned the mortgage and all moneys due thereon to Margaret A. Strachan.

In 1889 Frances E. Berkinshaw obtained a conveyance of the lands, subject to the mortgage.

The mortgage money became payable on the 1st December, 1892, and Frances E. Berkinshaw, being then the owner of the equity of redemption, her husband, William H. Berkinshaw, applied to Margaret A. Strachan for an extension of time for payment of the mortgage, and thereupon an agreement was entered into between Frances E. Berkinshaw and her husband, of the first part, and Margaret A. Strachan, of the second part, in December, 1892, whereby, after reciting the above facts, it was witnessed that it was thereby mutually agreed between the parties that the time for payment of the mortgage moneys should be and the same was thereby extended until the 1st December, 1897; and that in consideration of the premises

Statement. and of the extension of time granted, and of the sum of \$1, the parties of the first part, and each of them, for themselves, their heirs, executors, and administrators, covenanted with the party of the second part that they, or some one or other of them, would pay the sum of \$1,050 on the 1st December, 1897, together with interest thereon at the rate provided for in the mortgage, and that they would observe all the covenants, provisoes, and agreements contained in the mortgage, and would indemnify the party of the second part from all loss she might incur by reason of default in the payment of the principal or interest or by any breach of the covenants, provisoes, and agreements; provided that nothing contained in the agreement should be construed to release the other parties liable under the mortgage from any of the covenants therein contained, the party of the second part expressly reserving all her rights against such parties.

As between Frances E. Berkinshaw and her husband, the former was the principal, and the latter a surety in respect of the mortgage indebtedness.

William H. Berkinshaw, the husband, having become insolvent, made an assignment of his estate for the benefit of his creditors, under R. S. O. ch. 147, to the plaintiff, as trustee for creditors.

The defendants, the executrices of the estate of Margaret A. Strachan, filed with the plaintiff a claim for the amount of the mortgage indebtedness.

The defendants claimed the right to rank on the estate in the hands of the assignee for the full amount of such indebtedness; but the plaintiff insisted that they should value the mortgage security and rank only for the balance.

The defendants asserted that, as between Frances E. Berkinshaw and William H. Berkinshaw, on the one part, and themselves, on the other part, both the former were directly and primarily liable for the indebtedness; but the plaintiff contended that the security held by the defendants was a security on the estate of Frances E. Berkinshaw, for whom William H. Berkinshaw was only

secondarily liable within the meaning of sec. 20 (4) of the *Statement*. Act respecting Assignments and Preferences by Insolvent Persons, R. S. O. ch. 147.

The question submitted to the Court by the parties was whether the defendants were or were not obliged, in ranking upon the estate, to value their security.

The case was heard before ARMOUR, C.J., in Court, on the 26th April, 1898.

Shepley, Q.C., for the plaintiff. The creditors must value their security, as it is upon the estate of a person for whom the debtor was only secondarily liable. The form of the transaction can make no difference. The principles of *Duncan v. North and South Wales Bank* (1880), 6 App. Cas. 1, as explained by Lord Selborne, apply. *Bell v. Ottawa Trust and Deposit Co.* (1897), 28 O. R. 519, is a different case from this. I refer also to *Wyld v. Clarkson* (1886), 12 O. R. 589.

Worrell, Q.C., for the defendants. *Bell v. Ottawa Trust and Deposit Co.* governs this case. The form of the transaction is what must be looked at. Both parties are primarily liable to the defendants, and have expressly made themselves so. I refer to *Re Jones—Ex p. Consolidated Bank* (1878), 2 A. R. 626.

April 28, 1898. ARMOUR, C.J.:—

In my opinion, the defendants are obliged, in ranking upon the estate of the insolvent, to put a specified value upon their security, both according to the very words of the statute and to the reason and object of it.

The provision is that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon," etc.

This clearly means that if, as between the debtor and

Judgment. the third party, the third party is primarily liable and the debtor only secondarily liable, the creditor must put a specified value upon his security.

It matters not if, according to the form of the transaction, the debtor and the third party are both apparently primarily liable to the creditor; if, as between themselves, the third party is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security, for in such case the third party is the party "for whom the debtor is only secondarily liable."

The form of the transaction is not to be looked at, but the substance of it, in order to ascertain whether the third party is the party primarily liable for the claim, and if it be found that he is, the debtor is then only secondarily liable for the claim, within the meaning of the provision.

The reason and object of the provision was to prevent the estate of a debtor being burdened by claims for which the debtor was only secondarily liable to a greater extent than was necessary for the protection of the creditor, and to augment his estate as much as possible: *In re Turner* (1881), 19 Ch. D. 105.

E. B. B.

MORROW V. THE LANCASHIRE INSURANCE COMPANY.

Fire Insurance—Mortgage—Cancellation of Mortgagor's Insurance—Double Insurance—Proofs of Loss—R. S. O. ch. 203, sec. 163, sub-sec. 8; sec. 169, sub-sec. 19.

The plaintiff insured his barn in the defendant company for \$2,100, and afterwards mortgaged his farm, including the barn, to a loan company for \$1,500, assigning the policy to the company as collateral security. The mortgage purporting to be under the Short Form Act contained a covenant that the mortgagor would insure the buildings, unless already insured, for not less than \$1,000, provided that the mortgagees might themselves effect such insurance without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of \$600. The property having been destroyed by fire the plaintiff notified the company, when they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, saying nothing as to furnishing proofs of loss :—

Held, that the plaintiff did not cease to be the person assured within the meaning of the Insurance Act, R. S. O. ch. 203, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act in that behalf :—

Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of sub-sec. 8, sec. 168, of R. S. O. ch. 203; nor could it be deemed a "double insurance" :—

Held, also, there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss.

THIS was an action to recover the amount of loss sustained by fire on a policy effected by the plaintiff in the defendant company. Statement.

The action was tried before BOYD, C., without a jury, at Toronto, on the 14th and 15th April, 1898.

The policy was duly issued under the defendant's corporate seal to the plaintiff, and was for the sum of \$2,100, of which the amount on the barn and contents was the sum of \$1,050.

On the 1st July, 1895, the plaintiff by a mortgage, purporting to be under the Short Form Act, mortgaged the lands and premises, including the barn, to the Hamilton Provident Loan and Saving Society, to secure the sum of \$1,500; and on the 17th of August, 1895, he assigned the said policy to the Loan Company as mortgagees.

Statement.

The mortgage contained the following covenant:—"And the said mortgagor," the plaintiff, "will insure the buildings on the lands to the amount of not less than \$1,000, being their full insurable value; provided that the mortgagees may themselves effect such an insurance without any further consent of the mortgagor."

On the 11th October, 1895, the policy was cancelled by the defendants, a rebate being allowed to the mortgagees, and the policy surrendered to the insurance company, and the mortgagees, assuming to act under the provisions of the mortgage, effected, but without his consent, an insurance in the Phoenix Assurance Company for the sum of \$600.

On the 22nd September, 1896, the property was destroyed by fire; and on the following day, the plaintiff wrote to the company notifying them of the fire; to which the company replied by letter, that the policy had expired, and they were not liable.

On the 17th December, 1896, the plaintiff wrote to the company offering to supply proofs of loss, if required; to which, on the following day, the company replied that the policy had been cancelled, and again set up their non-liability; but made no answer to the plaintiff's offer to furnish proofs of loss.

On January 17th, 1897, the plaintiff commenced his action, claiming for loss of barn \$300, loss of crops \$450, and loss of tools and implements \$130.65.

The defendants contended that by virtue of the assignment to the Loan Company the plaintiff had ceased to be the person assured within the meaning of the Ontario Insurance Act; that the policy was duly cancelled; but, if in force, the insurance in the Phoenix Company constituted a subsequent insurance under the 8th statutory condition.

It was further objected that no proofs of loss were furnished.

George Willkie, for the plaintiff.

McCarthy, Q.C., and *C. I. McInnes*, for the defendant company.

The learned Judge reserved his decision, and subsequently delivered the following judgment:—

Judgment.
Boyd, C.

April 18th, 1898. BOYD, C.:—

The policy is under seal and made with the plaintiff. He assigned it, with the assent of the defendants, to his mortgagee for the purpose of collateral security to the mortgage debt. This did not change the nature of the contract evidenced by the policy, and plaintiff did not cease to be the "person assured" within the meaning of the Insurance Act of Ontario.

This policy could not, in my opinion, be cancelled by the defendants, unless they strictly followed the provisions of the Act in that behalf. A notice to that effect, in writing, is to be served upon the assured by virtue of section 169, sub-section 19; and any transaction imputing cancellation and surrender between the company and the mortgagees—the conditional holders of the policy—without the privity of the assured (as in this case) was nugatory.

The body of the law on this head is all found in *Caldwell v. Stadacona Fire and Life Ins. Co.* (1882), 11 S. C. R. 212, and the position of the mortgagor as the assured in cases of the policy being assigned for the purpose of security, is discussed in *Anderson v. Saugeen Mutual Fire Ins. Co. of Mount Forest* (1889), 18 O. R. 355, 366; and *McPhillips v. London Mutual Fire Ins. Co.* (1896), 23 A. R. 524.

This clears the way to consider the next objection urged to the plaintiff's recovery, viz., that there was subsequent insurance here effected within the meaning of R. S. O. ch. 203, sec. 168, sub-sec. 8.

The plaintiff's mortgage to the Hamilton Provident Loan and Savings Society is expressed to be made pursuant to the Short Form Act. It contains these words:—"And the said mortgagor will insure the buildings on the lands to the amount of not less than \$1,000, viz., their full insurable value; provided that the mortgagees may them-

Judgment. selves effect such insurance without any further consent of
Boyd, C. the mortgagor."

The first part of the extract is to be expanded thus, by the effect of the statute R. S. O., p. 970: "The mortgagor will insure, *unless already insured.*" There was the existing insurance in the defendants, prior to the mortgage, which (as to the buildings) insured the sum of \$750, and this was accepted by the mortgagees as satisfactory. This policy was assigned to the Hamilton company as mortgagees, on 17th August, 1895, and was, as all admit, in force till 11th October, 1895, the date of the alleged cancellation. Thereafter the Hamilton company assumed to insure, in the name of Morrow, the said buildings for the sum of \$600 in the Phoenix Company, which it was said in evidence was their full insurable value. It is manifest, therefore, that an insurance up to \$1,000 could not be procured, and was not expected to be obtained in respect of the buildings; and, it is also manifest that the buildings were better insured by the plaintiff than was effected by means of the insurance in his name carried out by the Loan Company. But for the alleged cancellation, the Loan Company would have retained the old insurance.

The proper conclusion from the evidence and the frame of the writings, is that the power to effect an insurance, as for the mortgagor, did not arise in this case, and the insurance by the Loan Company with the Phoenix must be in law regarded as an unauthorized transaction, not effected with the privity of the plaintiff, nor justified by the terms of the mortgage. Their own interest, as mortgagees, the Loan Company might have protected by a new insurance, but there was no power on their part to aid in abolishing or cancelling the policy assigned to them, for the purpose of obtaining another policy, and specially one more unfavourable to the mortgagor, both as to buildings and chattels.

I do not see that the defendants can avail themselves of the unauthorized acts of the Loan Company as against the plaintiff. That insurance company must be taken to know that they had not validly cancelled the contract sued

upon by a transaction with the Hamilton company, and it is not proved that the plaintiff knew of or sanctioned the subsequent insurance with the Phoenix appearing in his name. There was, therefore, no second or subsequent insurance put upon the property, for which the plaintiff is responsible.

Judgment.

Boyd, C.

I cannot regard this as a case of "double insurance," as understood in commercial law: *North British and Mercantile Ins. Co. v. London, Liverpool and Globe Ins. Co.* (1877), 5 Ch. D. 569, at p. 587.

The plaintiff's interest in the policy he effected is not to be defeated by the wholly unauthorized act of a stranger effecting a second insurance in his name without his knowledge: see *per* Hagarty, J., in *Dafoe v. Johnston District Mutual Ins. Co.* (1857), 7 C. P. 59; and *Gilchrist v. Gore District Mutual Fire Ins. Co.* (1873), 34 U. C. R. 15.

Objection is also made because of want of complete proof of loss. The statute, section 168, sub-section 13, prescribes what is to be done in order to furnish proof of loss, and the first step is that the assured is forthwith after loss to give notice in writing to the company. That was complied with here. The fire was on 22nd September, 1896, and a letter was sent to the company on the next day. The answer came that the policy had expired, and that the company were not liable. The plaintiff offered, on 17th December, to supply full proof if required, but the company, while affirming cancellation of the policy, was silent on this point, and they had the policy in their hands as surrendered. This is a case for dispensation with strict compliance as to proof of loss under section 172; the steps of proof are grouped under the letters "a," "b," "c," "d," and "e". The plaintiff took the first step "a," and to follow up with the others would have been a needless expense having regard to the company's attitude. The company was invited to say whether they wished further proof, and they remained silent, which may well be contended as implying they did not call for proof, as they would resist the claim on the ground of cancellation. This gives rise

Judgment. to the "mistake" on the part of the plaintiff in not sending in further proof before action: *Robins v. Victoria Mutual Ins. Co.* (1881), 6 A. R. 427.

Boyd, C.

Besides, this matter of proof seems to me of minor consequence, not one on which the company would have litigated *per se* apart from the other defences, and as to which it appears inequitable to turn the plaintiff round. I think the company in this case was required to speak in answer to plaintiff's letter of notification, if they wished for more proof.

But further, apart from the statute, the general principles of law as to waiver of conditions for the benefit of the company shew that the attitude of the company on being advised of the fire was such a repudiation of liability as relieved the plaintiff from proceeding to make formal proof of loss.

Thus it is held in *Boyd v. Cedar Rapids Ins. Co.* (1886), 70 Iowa 325, that the refusal to pay a loss based on facts within the company's knowledge, and made under such circumstances as justify the insured in believing that the making proof would be a vain act, is equivalent to a waiver of proof—though the obligation to make proof rests on statute as well as on contract. The general current of decisions in this direction is illustrated and cases cited in *Omaha Fire Ins. Co. v. Drieks* (1895), 43 Nebr. 473; and in *McCormick v. Royal Ins. Co.* (1894), 163 Pa. St. 184. *Whyte v. Western Assurance Co.* (1875), 22 L. C. Jur. 215, before the P. C., is not elsewhere reported, but it lays down no absolute proposition that proof of loss is in every case essential, and it is explained thus in *Kelly v. Hochelaga Mutual Fire Ins. Co.* (1880), 3 Leg. N. 63.

The plaintiff proves loss of barn \$300, loss of crops \$450, and loss of tools and implements \$130.65.

Only the barn was the subject of further insurance by the Hamilton Loan Company, and no other insurance affects the crops and implements. Though the Phoenix has paid to the Loan Company \$240 for insurance on the barn (which was all it was insured for in that company), I do

not see that the plaintiff is precluded from recovering that loss at \$300 from the defendants. There may be adjustments between the Loan Company and the insurance companies as to the \$240, with which I have nothing to do.

Judgment.

Boyd, C.

Then as to the crops, I do not think that the plaintiff should recover, on his own evidence, for more than \$230 for oats, peas and straw consumed. The tools and implements may stand at \$130.65.

The judgment will, therefore, be for the aggregate \$660.65, and interest from date of action, and costs to be paid by defendants.

G. F. H.

IN RE HEWETT V. JERMYN.

*Will—Devise to Executors—Grant of Probate to One of Two Executors—
Right of Executor to Sell Land.*

A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband during his lifetime, and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts :—

Held, that he had power to make a valid sale, and that the devise being to the executors, section 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power.

Re Koch v. Wideman (1894), 25 O. R. 262, followed.

THIS was a petition under the Vendor and Purchasers Statement. Act by a vendor.

The petitioner, William Hewett, was the executor of the last will and testament of his late wife, Emily Hewett, who died seized in fee simple of the lands in question.

She died on the 18th March, 1892, leaving her last will,

Statement. bearing date the 30th September, 1887, in the following words:—

1. I devise and bequeath my property real and personal of every nature and kind whatever to my said husband William Hewett and Joseph T. Rolph of the said city of Toronto, lithographer, in trust as my executors, to carry out the provisions of this my will.

2. I direct my said executors to divide my clothing, jewellery and personal effects among my children who shall survive me in such way as shall seem to my said executors fair and equitable, and to pay out of my estate all my just debts and funeral and testamentary expenses, and any interest which may accrue from time to time upon any mortgages or other charges upon my real estate, and to carry on my dry goods business, if they deem it advisable to do so, or to sell the same and invest the proceeds as they see fit; and with general power and authority, if in their discretion they deem it advisable, to sell all or any of my property and to grant and execute all proper and sufficient conveyances to the purchaser or purchasers thereof, as fully and effectually as I myself could do, and to invest and reinvest the proceeds arising from any such sale as they may deem best.

3. I direct my executors to pay over the net revenue or income arising from my estate or the investment of the proceeds thereof, after deducting the expenses and disbursements reasonably incurred and made in the carrying on of my said business or the management of my estate, to my said husband William Hewett during his lifetime.

4. After the death of my said husband I direct my said executors to sell all my property as soon as conveniently may be and to convert the proceeds into money, and divide the same equally among my children surviving at the time of the death of my said husband, provided however that if any of my children shall have died before that time leaving issue them surviving such issue shall represent and be entitled to the share of their deceased parent to be equally divided between them.

Joseph T. Rolph, one of the two executors named in the will, never acted in that capacity and renounced his right to probate; and, on 20th April, 1892, probate was granted to the petitioner, William Hewett, as sole executor. Statement.

On 19th February, 1898, he contracted to sell to Thos. J. Jermyn the lands in question for the purpose of procuring money to pay the debts of the deceased, and of otherwise administering her estate.

Emily Hewett left seven children, all of whom were surviving, and one of these children made a conveyance to a third person, which was registered, of all his interest in his mother's estate.

The purchaser objected to the vendor's title upon the ground that the vendor should have registered a caution under the Devolution of Estates Act if he desired to sell the lands for the payment of debts, and that his power to sell in the absence of the other executor named in the will was of too doubtful a character to be forced upon a purchaser.

On March 31st, 1898, *Holden*, supported the petition. The question is whether the executor, who took out probate, could sell the property. It is admitted that the testator had a good title to the property, and the whole question is, whether in this case as one of the two executors renounced probate and the other alone took out probate and acted, he could make a sale. The 2nd clause of the will contains a clear direction to sell. The case comes within 21 Hen. VIII. ch. 4, which provides that where lands are willed to be sold by executors, and some of them refuse to be executors, and to accept the administration of the will, the sales by the executors shall be as valid as if all the executors joined: *Walker on Executors*, 3rd ed., pp. 168, 326; *Williams on Executors*, 9th ed., 821; *Re Koch v. Wideman* (1894), 25 O. R. 262; *Farwell on Powers*, 2nd ed., 89; *Re Ford* (1879), 7 P. R. 451; *Theobald on Wills*, 4th ed., 362, 365-6; *Dart on V. & P.*, 6th ed., 685-6; *Crawford v. Forshaw*, [1891] 2 Ch. 261; *Re Peppercorn v. Wayman* (1852), 5 DeG. & Sm. 230; *Lane v. Debenham*

Argument. (1853), 11 Hare 192; *Adams v. Taunton* (1820), 5 Madd. 435; *Re Fisher and Haslett* (1884), 13 Ir. R. Ch. 546; *Re Brooke, Brooke v. Brooke* (1894), 1 Ch. D. 43, 50; *Elliot v. Merryman* (1881), 2 W. & T. L. C., ed. 1897, p. 896; *Re Tanqueray-Willaume and Landau* (1881), 20 Ch. D. 465; *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731; *Brassey v. Chalmers* (1852), 16 Beav. 231, 4 DeG. M. & G. 528. Then as to the point that the executor should have registered a caution if he desired to sell, this has been disposed of by the case of *Re Koch v. Wideman* (1894), 25 O. R. 262.

Hamilton Cassels, contra. The cases referred to by the other side do not apply. It is quite clear under the statute of Hen. VIII. there must be an express direction to sell, here there was no such direction, but merely a power to sell. Where a naked power is given to several persons it cannot be executed by the survivors: Farwell on Powers, 2nd ed., 457; Chance on Powers, 241. All we say is that the matter is one of doubt, and where there is a question of doubt, the Court will not compel a purchaser to carry out the purchase. The effect of a portion having been sold by one of the children shews an assumption of right made by him: *Re McNab* (1894), 1 O. R.; *Lyon v. Radenhurst* (1856), 5 Gr. 544. The executors should have registered the caution. The case of *Koch v. Wideman* (1894), 25 O. R. 262, does not dispose of this. Under the Devolution of Estates Act it is essential that a caution should be registered.

April 20th, 1898. STREET, J.:—

I think this case is a very plain one. The devise is to William Hewett and Joseph T. Rolph, in trust as executors to carry out the provisions of the will. Joseph T. Rolph having renounced his right to probate has disclaimed the trust attached to the devise of the estate; he cannot act as executor, and therefore cannot act in the trust with which the testatrix sought to clothe him in his character of executor only: R. S. O. ch. 59, sec. 65.

Many refinements arise in the cases, upon the question as to whether the devisees took in the character of executors, or as trustees of the land, or as individuals: none of these can arise here owing to the precise language in which the devise is framed in that respect: *Bonifaut v. Greenfield* (1587), Cro. Eliz. 80; *Denne d Bowyer v. Judge* (1809), 11 East 288.

Judgment.
Street, J.

The disclaimer of one devisee in trust has the effect of vesting the whole estate in the other trustee for the purposes of the trust, and this principle is the simple solution of the purchaser's objections which has been so elaborately argued: *Crewe v. Dicken* (1798), 4 Ves. 97; *Adams v. Taunton* (1820), 5 Mad. 435; *Nicloson v. Wordsworth* (1818), 2 Swanst. 365; *Browell v. Reed* (1842), 1 Hare 434; Lewin on Trusts, 8th ed., p. 200; *Small v. Marwood* (1829), 9 B. & C. 300.

The other point as to the obligation of the executor to register a caution is, I think, practically covered by the decision upon the same point of *In re Koch v. Wideman*, 25 O. R. 262.

There is a devise here to the executors with which sec. 13 of R. S. O. ch. 127, the Devolution of Estates Act, in no way interferes.

The purchaser's objections should therefore be overruled, and he should be ordered to pay the costs of the petitioner.

G. F. H.

BAKER V. STUART (No. 2).

Devolution of Estates Act—Widow's Election—Election after Lapse of a Year—Administration by the Court—R. S. O. ch. 127, sec. 4.

When on administration by the Court of the estate of an intestate lands have been sold, the widow, although declared entitled to dower by the judgment, may, though more than a year has elapsed from the death of her husband, elect to take her distributive share in lieu of dower, provided the estate be not yet distributed on the footing of her having retained her dower right.

Statement. THIS was an appeal from a ruling of the Master, at Cornwall, upon the reference directed herein, as reported 28 O. R. 439, under the circumstances stated in the judgment.

The appeal was argued on April 6th, 1898, before BOYD, C.

J. H. Moss, was first called on and contended that under R. S. O. ch. 127, sec. 4, sub-sec. 2, a widow must make known her election to the personal representatives within twelve months from the testator's death; that after that period, if no caution has been registered, the land vested in the heirs under section 13, and no method is provided in the Act for a widow enforcing her election against them; that after the twelve months the fund ceases to be treated as all personalty, and is restored to its original character: *Re Reddan* (1886), 12 O. R. 781; *Scott v. Supple* (1893), 23 O. R. 393.

E. D. Armour, Q. C., for the widow, stated that he believed it had been decided that a widow is not bound to elect until she knows what the distributive share is, and contended that the Act R. S. O. ch. 127, placed no limit of time on the widow's rights, which, therefore, must be controlled by the exigencies of the administration, though no doubt a purchaser for value would be protected after the year; that here the land had always been in the hands of the Court, and until the adminis-

tration ordered by the Court was completed the widow Argument. was not bound to elect.

Moss, in reply, contended that the right of election here was purely statutory and could only arise when the statute had been complied with.

April 7th, 1898. BOYD, C. :—

Testator died in August, 1896 ; probate of will November, 1896 ; and action to construe will began January, 1897 ; judgment March 18th, 1897, declaring intestacy as to lands and that widow was entitled to dower thereout notwithstanding benefits received by her under the will. The Master was directed to sell the lands if that was needed for purposes of administration and distribution, and a sale was had under the judgment in October, 1897.

The widow filed a statutory deed of election to take a distributive share of the estate instead of dower on March 14th, 1898, more than a year after the death.

The master has ruled that the widow cannot elect because of the judgment having declared her entitled to dower, and on appeal his ruling is supported on the further ground that the right to elect should be exercised within a year from the death according to the scheme and intention of the Devolution of Estates Act and that now it is too late for the widow to act under sec. 4, sub-sec. 2 (ch. 127, R. S. O.), as read with *ibid.* section 13. No question of title arises in this case for the lands have all been sold and the purchase money is in Court. That being so I do not see that the widow may not effectively declare her election to take a distributive share of these proceeds instead of claiming dower so long as the money is in the hands of the Court. The Act requires the husband as to his curtesy to elect within six months after his wife's death, section 4, sub-section 3, but no time-limit is expressed as to a wife's election in the 2nd sub-section of the same clause. That would appear to leave it open for the wife or widow to claim by election a distributive share, so long as the estate

Judgment.

Boyd, C.

had not been divided or distributed on the footing of her having retained the right to dower. The rights of the beneficiaries and of the next of kin were not known or ascertained legally in the estate until the will had been construed by the judgment of March, 1897, and within a year from that time the widow makes her statutory election, which disturbs the rights or shares of no one entitled to receive a distributive portion. The judgment pronounced by me was not meant to conclude the right of the widow to share on the footing of doweress; it was a declaration that upon the construction of the will she was entitled to dower as well as the testamentary benefits bestowed upon her. Nor do I think the mere lapse of time operates under the statute in the circumstances of this case to bar her privilege under the 4th section, subsection 2, of the Devolution of Estates Act.

The costs should come out of the estate.

A. H. F. L.

IN RE SCHOOL SECTION NO. 16 TOWNSHIP OF HAMILTON.

*Public Schools—School Section—Appeal from Township to County Council
—“Divide”—R. S. O. ch. 292, sec. 39.*

Under R. S. O. ch. 292, sec. 39, there is no longer any appeal to the county council from the refusal of a township council to “divide” a school section.

Statement.

THIS was a motion on behalf of the trustees of school section No. 16 of the township of Hamilton, in the county of Northumberland, for an order that the award made by the arbitrators appointed by the municipal council of the united counties of Northumberland and Durham to consider and decide upon an appeal to the council in regard to school section No. 16, on January 26th, 1898, be set aside on various grounds.

After various prior proceedings, not necessary to mention here, a petition was presented to the township council of

the township of Hamilton by certain ratepayers of school section No. 16 for division of the section, which the former by resolution refused to do. Statement.

Thereupon an appeal was taken to the counties council of the united counties, which appointed arbitrators, in supposed pursuance of the Public Schools Act, who made the award now in question, which was that the boundaries of said school section "shall be altered and the said school section No. 16 shall be divided into two school sections and that school section No. 16 shall consist of lots, etc. And that a school section to be called and known as school section No. 19 of the said township of Hamilton shall be formed which shall consist of lots, etc."

The present motion was argued on April 7th, 1898, before BOYD, C.

R. C. Clute, Q.C., and *Boggs*, for the trustees, objected that the township council having refused to "divide" only, no appeal lay under the Act, now R. S. O. ch. 292, sec. 39, sub-sec. 1, to the counties council at all; that it is only when there is a refusal to "alter" that such an appeal lies since 54 Vict. ch. 55, sec. 82 (O.); that sub-section 3 of section 39 bears out this contention; and that if the petitioners to the township wanted a division, they should get another township council elected, which would do as they desired. They referred to *In re Chesterfield Public School* (1898), 29 O. R. 321.

W. R. Riddell, for the petitioners, appellants, contended that this was a case of refusing to "alter" the boundaries, and, moreover, that everyone was present before the arbitrators and no such objection was then taken.

Masten, for the township of Hamilton.

April 12th, 1898. BOYD, C.:—

After some hesitation I am obliged to say that the change made in the Public Schools Act by the amendment contained in sec. 82 of 54 Vict. ch. 55 (1891), has in some

Judgment. respects limited the right of appeal to the county council.
Boyd, C. Before this amendment the township council had power to pass by-laws (1) to alter the boundaries of a school section; (2) to divide an existing section into two or more sections; (3) to unite portions of an existing section with another section or with any new section: R. S. O. 1887, ch. 225, sec. 81. By next section 82 an appeal was given to the county council against any by-law for the formation, division, union or alteration of a school section or sections and against the neglect or refusal of the township to form, divide, unite or alter the boundaries of a school section or sections.

The change made by the Act of 1891 (although a consolidating and revising Act it is in this regard noted as an amendment) is that by the latter appeal is limited to neglect or refusal to alter the boundaries of a school section or sections.

Did this change—this omission of words—mean something or nothing? Is ‘alteration’ of boundaries large enough to cover union and division? I should prefer to hold that no change was made or intended in the school law: no reason for making such a change is obvious or was pointed out in the argument. But giving words their fair meaning and having regard to the particular grouping of words in these clauses the better and only proper interpretation appears to be that a limited meaning should be given to alteration of boundaries.

Dr. Murray’s definition of alter is “to make (a thing) otherwise or different in some respect; to make some change in character, shape, condition, position, quantity, value, etc., without changing the thing itself for another; to modify, to change the appearance of,”—*sub voce*.

Now if you alter one school section so as to make two school sections out of it—the thing itself has become changed in the operation: where you started with one section you close with two sections. That piece of municipal legislation is better characterized as a division of the school section than as an alteration of it. Therefore, it is to be

considered, I think, that an alteration of the boundaries of a section or sections means some change of course in the lines delimiting the territorial area of the particular section or sections so being modified, leaving it in other respects intact. For an example see *Patterson v. Hope*, 30 U. C. R. 484.

Judgment.
Boyd, C.

What was sought in this case was the division of school section 16 into two equal parts, each of which was large enough to become and be a section by itself and these to be numbered (new No.) 16 and (new No.) 19. This application was rejected by the township council, and this rejection was of a proposal to divide the existing section 16 into two new sections which was other and more than an alteration of boundaries of the existing section. The conclusion is fortified when one regards the prior course of legislation which has been gradual in the way of conferring the varied powers in question. These township councils were empowered by the consolidated statute of Upper Canada to form new school sections, to alter boundaries of existing sections and to unite two or more sections (C. S. U. C. ch. 69, sub-secs. 39-41). It was not till 1877 that power was given to divide an existing section into two or more sections: 40 Vict. ch. 16, sec. 7. The powers as now combined first appear in the revision of 1877, ch. 204, sec. 81, with appropriate provision for appeal in section 88.

The present law (carried on from 1891 into the consolidation of 1896, 59 Vict. ch. 70, sec. 39, and into R. S. O. 1897, ch. 292, sec. 39), gives no appeal in such a case and all the proceedings thereafter culminating in the majority award, fall to the ground as *ultra vires*. It is not a case for costs: particularly as no objection to jurisdiction was taken till the last stage before me.

A. H. F. L.

KEEFER V. THE PHOENIX INSURANCE COMPANY OF HARTFORD.

Insurance—Fire—Vendor and Purchaser—Fire after Contract of Sale—Right of Insured to Recover—Parol Contract—Admissibility of Evidence.

House property was sold by written contract for \$2,000, the parties to the contract at the same time verbally agreeing that until payment of the purchase money the vendor would insure the property for that sum, which he did with the defendants by policy insuring himself, his heirs and assigns, against damage by fire not exceeding the above amount nor his interests in the property, without saying anything about the sale. A fire occurred with a total loss of \$1,740, before which, however, the purchaser had paid \$1,300 of the purchase money :—

Held, that evidence of the parol contract was admissible.

Parcell v. Grosser (1885), 1 Atl. R. 909, followed.

Held, also, that "heirs and assigns" in the policy meant heirs and assigns of the property, and the purchaser was an assign; and the vendor could recover the amount of his own loss, \$700, and also the residue of the loss as trustee for the purchaser.

Statement. THIS was an action by H. F. Keefer upon a policy of insurance for \$2,000, whereby the defendants agreed to indemnify and make good unto the plaintiff, his heirs and assigns, all such loss or damage not exceeding the above amount as specified in the policy, nor the interests of the assured in the property, being certain buildings in the town of Thorold, the loss under which had been made payable to the Quebec bank by endorsement thereon.

The facts are fully set out in the judgment.

The case was argued before FERGUSON, J., on admissions of fact on January 5th, 1898.

H. H. Collier, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

The following cases were referred to: *Powles v. Innes* (1843), 11 M. & W. 10; *Bank of New South Wales v. The North British and Mercantile Ins. Co.* (1881), 2 N. S. W. L. R. L. 239; 3 N. S. W. L. R. L. 60; *Castellain v. Preston* (1883), 11 Q. B. D. 380, 397-8, 406; *Insurance Co. v. Updegraff* (1853), 21 Penn. 513; *Hill v. Cumberland Valley Mutual Protection Co.* (1868), 59 Penn. 474; *Reed v. Lukens* (1863), 44 Penn. 200, 300; *Parcell v. Grosser*

(1885), 1 Atl. R. 909; *Clinton v. The Hope Ins. Co.* (1871), 45 N. Y. 454, 467; *McPhillips v. London Mutual Ins. Co.* (1896), 23 A. R. 524; *West of England Fire Ins. Co. v. Isaacs*, [1896] 2 Q. B. 377, S. C. in App., [1897] 1 Q. B. 226; *Rayner v. Preston* (1881), 18 Ch. D. 1; *Ardill v. Citizens Ins. Co.* (1893), 20 A. R. 605. Argument.

April 7th, 1898. FERGUSON, J. :—

On the 28th day of February, 1894, the plaintiff Keefer obtained a policy of insurance from the defendants upon certain buildings situate in the town of Thorold. The insurance was \$1,700 upon one building and \$300 upon another. This policy was properly renewed and kept on foot till the time of the happening of the fire on the 11th day of December, 1896. By this fire there was damage to one of the buildings amounting to the whole \$1,700, and to the other building amounting to \$40. There is no dispute now as to the amount of such damage in fact, \$1,740. Before the obtaining of this policy (and on the 25th day of July, 1893,) the plaintiff Keefer had entered into a contract with one George D. Cloy, for the sale to Cloy of the premises on which were the buildings insured for the price or sum of \$2,000, and upon, or in pursuance of this contract Cloy had paid Keefer \$800 before the obtaining of this policy, and before the happening of the fire had paid Keefer further sums the whole amount paid before the fire being \$1,300. The plaintiff Keefer did not disclose to the defendants the fact of his having made the contract with Cloy nor had the defendants any knowledge of such contract till the day before the day on which the fire happened.

The property had been owned by a person who had made an assignment for the benefit of creditors to one Patterson, who when such assignee insured the buildings with these defendants. Keefer purchased the property from Patterson and thereafter made the contract of sale to Cloy. The policy obtained by Patterson was existing and

Judgment. in force at the time of the contract between Keefer and Ferguson, J. Cloy. This, however, was surrendered at the time the policy now sued on was obtained and some unearned portion of the premium refunded.

The plaintiffs Keefer and the Quebec bank are in the same interest and seek to recover from the defendants the whole sum of \$1,740. The defendants contend that they are liable to the payment of \$700 only, this sum being equal to the unpaid balance of purchase money owing to the plaintiff Keefer upon the sale of the lands and premises to Cloy. It is admitted that this sum was tendered before action and it has been paid into Court with the defendants' pleading.

The case comes before me on written admissions signed by counsel instead and in lieu of evidence given in the ordinary way.

By one of such admissions the defendants admit that George D. Cloy and John Cloy, witnesses on plaintiffs' behalf would, if called, state under oath that at the time of the making of the agreement of the 25th day of July, 1893, between Keefer and George D. Cloy and during "the bargaining therefor," it was agreed between the plaintiff Keefer and George D. Cloy, that until the purchase money was fully paid the plaintiff Keefer would keep the property insured to the extent of \$2,000.

The defendants, however, on the face of the admissions object that such testimony would not be admissible and could not be heard and in support of the position so taken by them the defendants refer to the written agreement between Keefer and Cloy, urging also that the written agreement is contradictory of such testimony.

However peculiar the position may appear or be, I have to deal with this element of the case on these premises, counsel seeming to think the fact of the existence or not of such an agreement between Keefer and Cloy an important fact, it being contended on behalf of the plaintiffs that the existence of such an agreement would assist or enable the plaintiffs to recover against the defendant in

the interest of Cloy the purchaser as well as in the interest of the plaintiff Keefer. Judgment.
Ferguson, J

The parties Keefer and Cloy, deliberately reduced their contract into writing. The document seems to have been thoughtfully drafted containing as it does a provision apart from the agreement to transfer the property in respect to a release of John Cloy, but it is entirely silent as to what is now sought to be proved by parol.

It will be observed that the admission is that the witnesses, if heard, would say "that at the time of making the agreement of the 25th of July, 1893, and during the bargaining therefor," the agreement sought to be proved by verbal evidence took place or was made.

According to the well-known rule if this parol evidence is considered evidence varying the written contract it should be excluded and the writing alone looked at.

It was, however, contended that the agreement that would according to the admission be spoken of by the witnesses was an agreement collateral to the agreement for the sale of the property and for this reason could be shewn by parol notwithstanding the existence of the writing which is silent in regard to it. This contention was put forward on the principle of *Lindley v. Lucey* (1864), 17 C. B. N. S. 578, and cases of the like kind. This subject was much discussed in the Court of Appeal in the case *Mason v. Scott* (1875), 22 Gr. 592, and many of the cases referred to and somewhat commented upon. I have been at some trouble to ascertain whether or not the agreement spoken of was really a collateral one of which parol evidence could be given, it not appearing to me to be the reason for the making of the agreement that was reduced to writing or the foundation of it, and not seeming to be based upon any separate consideration. The question seems, however, to have been decided in the Supreme Court of the State of Pennsylvania in the case *Parcell v. Grosser* (1885), 1 Atlantic R. 909. The parol agreement made at the time of the contract for the sale of the property was that the policy of insurance on the building should enure to the benefit of

Judgment. the vendee and it was distinctly held that the parol contract was collateral to and not an essential or necessary part of the contract of sale, that it practically constituted a separate and distinct agreement. This being a decision of a Supreme Court upon a subject mixed of law and fact, as I think, and being so nearly if not entirely in point here, I think I should adopt the conclusion even though I should find difficulty in arriving at the same conclusion from our own cases, none having been cited or found exactly in point.

Ferguson, J.

Then assuming the evidence to have been received I do not see that it would have been contradicted by the written document.

I have not been permitted to see the witnesses or to hear any cross-examination of them. I can have no opinion as to the force of their testimony. The presumption is that they would speak the truth only. Such evidence would shew an agreement that until the purchase money should be fully paid the plaintiff Keefer would keep the property insured to the extent of \$2,000. If it were considered material I should find upon the admissions and documents that the defendants had no notice of this agreement. It was as I think an agreement enuring to the benefit of the purchaser.

By the policy the defendants agreed to indemnify and make good unto the assured, his heirs or assigns, all such direct loss or damage, etc.

The question now is to what extent the defendants are liable upon this policy. Both counsel referred to and placed reliance upon the case *Bank of New South Wales v. North British and Mercantile Ins. Co.*, (1881), 2 N. S. W. L. R. L., 239. I have perused that case as well as the cases referred to in it.

A number of American cases were referred to shewing or going to shew that the purchaser of the property has really an interest in the policy and that in case of a loss, the vendor becomes a trustee or trustee *pro tanto* for him.

Here there is in addition to what appears in many of

these cases the agreement between the vendor and purchaser above referred to. Judgment.

Ferguson, J.

It was contended that the indemnity contracted for by the defendants was an indemnity to the assured only and should be confined to the loss sustained by him. I am, however, of the opinion that the words "heirs or assigns" in the policy mean heirs or assigns of the property and that the purchaser falls within the meaning of the word "assigns."

The insured (Keefer) had an interest in the property at the time the insurance was effected. He had also an interest in the property at the time of the fire. He can recover upon this policy (this seems not to be disputed) and I think that he can, in the circumstances, recover, not only for the amount of his own actual loss, but to the extent of the whole loss by the fire, his recovery as to the part over and above the amount of his own loss being a recovery as trustee for the purchaser.

I am of the opinion that the plaintiffs are entitled to judgment for the sum of \$1,740 (which will include the money paid into Court by the defendants) and to their costs of the action.

Judgment for the plaintiffs for \$1,740 with interest from March 27th, 1897, and the costs of the action.

A. H. F. L.

WELLER ET AL. V. CARNEW.

Landlord and Tenant—Lease—Habendum—Repugnant Subsequent Clause.

A lease with habendum for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months' written notice prior thereto :—

Held that the clause was repugnant to the habendum, and must be rejected, and that the lease terminated at the end of the year without any notice.

THIS was an action tried before MACMAHON, J., without a jury, at Belleville, on March 28th, 1898.

Northrup, for the plaintiffs.

E. Gus Porter, for the defendant.

Statement. The action was brought to recover possession of certain premises in the city of Belleville, in the occupation of the defendant Carnew.

By lease under seal, dated the 13th of January, 1897, the plaintiffs leased to the defendant Carnew and one S. A. Hyman the premises, particularly described in the statement of claim. The *habendum* was "to the lessees, their executors, administrators and assigns, for the term of one year to be computed from the 13th day of January, one thousand eight hundred and ninety-seven."

Following the covenant for quiet enjoyment this clause was inserted: "And it is agreed between the parties hereto that either party may terminate this lease at the end of the year on giving three months' written notice prior thereto."

The plaintiffs brought this action at the expiration of the year without giving the notice.

It was urged by defendant that the effect of the clause following the covenant for quiet enjoyment was to make the ending of the term conditional on three months' notice being given by either party to the lease.

April 2nd, 1898. MACMAHON, J.:—

In Sheppard's Touchstone, p. 88, the rule for construction where there is repugnancy in a deed is thus stated :

"That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary; and therefore herein a deed doth differ from a will, for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received."

Judgment.
MacMahon,
J.

The rule from Sheppard's Touchstone is set out in Elphinstone's Interpretation of Deeds, p. 91, as Rule 20. And in Bouvier's Law Dictionary: "Repugnancy: A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty."

Shadwell, V.-C., in *Cope v. Cope* (1846), 15 Sim. 118, at p. 126, said: "The rule of law as to construing a deed is, that if you find the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter."

The latter clause inserted in the lease being inconsistent with the *habendum* must be rejected, and the plaintiffs are entitled to judgment for possession of the lands and premises set out in the third clause of the statement of claim, and for \$15 arrears of rent, together with full costs of suit.

G. F. H.

RE BROWN AND CAMPBELL.

Will—Estate Tail—Dying Without Issue—R. S. O. ch. 128, sec. 32—Construction of.

Section 32 of the R. S. O. ch. 128, is to be construed strictly, and is confined to cases in which the word "issue," or some word of precisely the same legal import is used; and does not extend to cases in which the word "heirs" is used.

Where a testator devised to his grandson, his heirs and assigns forever, certain land with the qualification that in case of his "dying without leaving any lawful heirs by him begotten" the land was to go to other persons named, the section was held not to apply, and that the grandson took an estate tail.

Statement. THIS was a petition, under sec. 4 of the Vendors and Purchasers Act, R. S. O. ch. 134, by Susthenus Johnston Brown, of the township of Whitchurch, farmer, setting out an agreement made between himself as purchaser and George F. M. Campbell, of the village of Campbellville, as vendor, whereby the petitioner agreed to purchase the westerly half of lot No. 3 in the said township of Whitchurch for \$4,000 and was to have a deed in fee simple of the same.

The petition set out that the vendor, George F. M. Campbell, had acquired title by deed from Florence Barkey, dated 17th April, 1895: that Florence Barkey acquired title under a deed from Joseph Lewis Barkey, dated 11th September, 1894, and that the said Joseph Lewis Barkey acquired title under the will of Joseph Barkey, who died on 22nd September, 1886, and who was at the time of his death the owner of the said lands.

The devise was contained in the 4th clause of the will, which was as follows:—

"Fourth. I give devise and bequeath unto my grandson Joseph Lewis Barkey the westerly half of lot number three in the sixth concession of the township of Whitchurch," etc., "and to enter into possession thereof when he shall have attained the age of twenty-one years. To have and to hold unto him his heirs and assigns forever, subject to the payment to my executors of \$250.00 with

simple interest at six per cent. per annum from the date hereof ; and any expenses that I may be at concerning or on account of my said grandson Joseph Lewis Barkey, subsequent to making this my last will and testament, I shall make an account of and enter the same in a book ; and I order that my said grandson shall pay the same amount back to my executors without interest ; and such book account shall be considered as part of this my last will and testament. Provided always nevertheless that in the event of my said grandson Joseph Lewis Barkey dying without leaving any lawful heirs by him begotten, the lands herein before devised to him shall be sold by my executors or their successors, and the price or proceeds thereof shall be equally divided among my six daughters, namely, Susannah McWain, Frances Wideman, Elizabeth Lehman, Matilda Burkholder, Mary Reesor and Annie Barkey, which I hereby give and devise unto each of them their heirs and assigns forever. My said grandson Joseph Lewis Barkey will be twenty-one years of age in the month of August one thousand eight hundred and ninety-three." Statement.

At the time of the conveyance by Joseph Lewis Barkey to Florence Barkey, Joseph Lewis Barkey had lawful heirs by him begotten. The said Joseph Lewis Barkey was still living and his heirs by him begotten were also still living.

The petitioner, the purchaser, raised an objection to the title to the said lands in that the said Joseph Lewis Barkey had not such an estate therein as entitled him to grant the same in fee ; while the said vendor and George F. M. Campbell claimed that he had acquired a good title as the owner of the said lands in fee simple.

The opinion of the Court was asked whether the said Joseph Lewis Barkey was possessed of such an estate as entitled him to grant to Florence Barkey an estate in fee simple absolute.

On March 31st, 1898, *Frank Denton*, supported the

Argument. petition. The question is whether the devisee under the will took an estate in fee simple with an executory devise over, or an estate tail. If he comes within sec. 32 of the Wills Act, R. S. O. ch. 128,* then he cannot make title; but if he does not, then he takes an estate tail, and his conveyance is good. The Act does not apply. The words used in the Act are, "die without issue," "die without leaving issue," or "have no issue." The words used in the will are "dying without any lawful issue by him begotten." These words do not come within the meaning of the Act: Jarman on Wills, 5th ed., pp. 1175, 1301, 1321, 1322; *Harris v. Davis* (1844), 1 Coll. 416; *Dawson v. Small* (1874), L. R. 9 Ch. 651; *Nanfan v. Leigh* (1815), 2 Marsh. 107, 9 Taunt. 85; *Good v. Good* (1857), 7 E. & B. 295.

C. C. Robinson, for vendor. The question raised by the other side is the only one raised, and the vendor claims he acquired a good title in fee simple. The following additional authorities may be referred to: Jarman on Wills, 5th ed., 324; *Nason v. Armstrong* (1892), 22 O. R. 542 (1894), 21 A. R. 183, (1895), 25 S. C. R. 263.

April 7th, 1898. STREET, J.:—

I am of opinion upon the facts stated in the case submitted that Joseph Lewis Barkey took an estate tail, under the will of his grandfather Joseph Barkey, in the lands in question. The devise is to Joseph Lewis Barkey

*Section 32.—"In any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

his heirs and assigns forever, with a qualification in the following words: "Provided always nevertheless that in the event of my said grandson Joseph Lewis Barkey, dying without leaving any lawful heirs by him begotten," then the property is to go to other persons.

Judgment.
Street, J.

The question is whether the words "dying without leaving any lawful heirs by him begotten," are within the 32nd section of the Wills Act R. S. O. ch. 128; and I am of opinion that the authorities require me to hold that they are not.

The English Wills Act was passed in the 1st year of Her Majesty's reign and contains a provision of which ours is a transcript. The decisions upon it have been few, but the accepted construction seems to be that it is to be construed strictly and confined to cases in which the word "issue," or some word of precisely the same legal meaning, is used, and that it does not extend to cases in which the word "heirs" is used, even although under the circumstances the words "issue" and "heirs" should relate to the same class. In other words, that the statute was intended to correct errors supposed to arise from the use of the word "issue," but was not intended to apply to cases in which the technical word "heirs" though coupled with words of procreation was used. Such was the construction plainly placed upon the English section by the Lords Justices in *Dawson v. Small* (1874), L. R. 9 Ch. 651, a case which has never been doubted during the twenty-four years that have elapsed since it was decided and which must, I think, be treated as having established a rule of construction only to be altered by the Legislature. See also to the same effect *Re Sallery* (1861), 11 Ir. Ch. Rep. 236; *Harris v. Davis* (1844), 1 Coll. 416; Jarman on Wills, 5th ed., p. 1322. See also *Re Edwards*, [1894] 3 Ch. 644; Theobald on Wills, 3rd ed., pp. 494-5.

The estate tail acquired by Joseph Lewis Barkey under this will has been converted into an estate in fee simple by the conveyance to Florence Barkey which she conveyed to the petitioner.

Judgment. The question submitted must therefore be answered in
Street, J. favour of the petitioner and the costs of the petition as
agreed by the parties will be paid by the vendor.

G. F. H.

MALCOLM V. PERTH MUTUAL FIRE INSURANCE CO.

*Malicious Prosecution—Reasonable and Probable Cause—Honest Belief of
Prosecutor—Reasonable Care in Ascertaining Facts—Bona Fides—
Malice.*

In an action for malicious prosecution brought against an insurance company by reason of an information charging the plaintiff with arson, and causing his arrest thereon, the jury found that the company's officers, who laid the charge, believed it to be true; but that such belief was not under the circumstances reasonable, and that they did not act on it in laying the charge and causing the arrest, but were actuated by other and improper motives:—

Held, that the jury having found that the defendants' officers honestly believed in the truth of the charge laid, and the evidence warranting that finding, absence of reasonable and probable cause could not be held to have been shewn simply because further inquiries might have been made or further facts shewn: that the question of malice was of no importance, and that the defendants were entitled to judgment.

Statement. THIS was an action for malicious prosecution, tried before ROSE, J., and a jury, at Brantford, on March 28th, 1898.

Brewster and Heyd, for the plaintiff.

Maybee, for the defendant.

The plaintiff was arrested on an information laid by the officers of the company charging him with setting fire to his building which was insured in the defendant company, upon which charge he was tried and acquitted.

The jury, in answer to questions submitted to them found that the officers of the company honestly believed that the plaintiff did set the building on fire; but that they did not act on such belief in causing the information to be laid and the plaintiff arrested; and that they were actuated by improper motives in making such arrest.

Upon these findings the learned Judge reserved his decision, and subsequently delivered the following judgment.

Judgment.

Rose, J.

April 22nd, 1898. ROSE, J.:—

The jury, in answer to questions, found that the officers of the defendant company honestly believed that the plaintiff did set fire to the building insured by the company, but that such belief was not under the circumstances reasonable; they further found that the officers of the company did not act upon such belief in causing the information to be laid and in causing the arrest of the plaintiff; and that they were actuated by improper motives in causing his arrest.

At the close of the plaintiff's case, and again upon the close of the whole case, the defendant's counsel moved for a ruling that absence of reasonable and probable cause had not been shewn. I thought it best to take the opinion of the jury upon the questions left to them, but reserved judgment on the motion.

The jury having found honest belief, and the evidence fully warranting that finding, it was then again urged upon me that my ruling should be in favour of the defendant and that judgment should be entered for it.

Since the argument, I have again carefully reviewed the case of *Archibald v. McLaren* (1892), 21 S. C. R. 588, and have come to the conclusion that on the undisputed facts of this case I should have ruled that there was no absence of reasonable and probable cause shewn.

The case of *Brown v. Hawkes*, [1891] 2 Q. B. 718, supports this contention. There, the findings were not dissimilar to those in this case.

The answer to the second question was in effect, having regard to my charge, that the officers of the company did not make reasonable inquiries into the facts of the case, and that it was not reasonable for them to give credence to the statements of Dr. Bailey owing to the fact which came to their knowledge that there had been serious dis-

Judgment.

Rose, J.

putes between him and the plaintiff which required very great care before accepting his statement. But, as put in Mr. Pollock's work on Torts (ed. 1887), p. 193 in the passage quoted by Patterson, J., in *Archibald v. McLaren*, at p. 603, of the report, "It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so."

I must take it as a fact that the officers of the company did honestly believe the statements made to them by Dr. Bailey and the other parties from whom they obtained statements, and the statements of their own officers, and such statements if believed were not only ample to justify an information and putting in motion the criminal law, but, if believed by a jury, would have been ample to sustain a conviction of the plaintiff for the crime of arson. I do not think I have had a case before me in which more earnest endeavours were made to ascertain the facts. Agents of the company were sent to the village where the building was that was burned, and they ascertained that the house was vacant, insured for probably more than it was worth; that the fire had probably been the work of an incendiary; that the plaintiff had come to the village in which the house was, a few days before the fire, and lodged with his sister-in-law; that he had caused to be erected a ladder against the house, probably to satisfy what he believed to be a condition of the insurance policy; that he had on the night of the fire purchased coal oil; and they further had the statement, which it must be assumed they believed, that he had acknowledged setting fire to the building, and had detailed the mode in which he proceeded, which was quite consistent with the statements their agents had made to them, as the result of their inquiries at the place where the building was burned.

It is said that the officers of the company should have prosecuted their inquiries further, and that they would have ascertained that on the night of the fire, and at the time of the alarm, the plaintiff was in his bed at his sister-in-law's house, and that he had purchased coal oil for her. Neither of these statements, if they were statements of

fact, would necessarily have displaced their belief in his guilt, because, if I remember correctly, he not only purchased coal oil at one store, but he also purchased it at another ; and even if he had made only one purchase of coal oil, there was nothing to prevent him from taking from the quantity that he purchased for his sister-in-law sufficient to accomplish his purpose ; and the fact that he was in bed at the time when the alarm of fire was given would not have necessarily raised any doubt as to his guilt, because, if the statement of his confession was believed, the mode which he adopted for setting fire to the building would have given him ample time to have gone from the house to his sister-in-law's and to have gone to bed, where he was said to have been at the time the alarm was given. In addition to these inquiries made at Corunna in the State of Michigan, where the plaintiff was residing, the taking of statements from the various witnesses as to the facts which they were prepared to prove, all manifest a care and scrupulousness which reflect credit upon the officers of the company. I know of no fact which was not disclosed by the evidence which should have been found by the jury to enable me to rule upon the question as to whether there was absence of reasonable and probable cause shewn. Indeed, my own opinion at the trial was very strong that the officers of the company were quite justified in the action they had taken, and I was surprised at the answer of the jury which found that the honest belief was not a reasonable belief. There being reasonable and probable cause, of course the finding as to malice is immaterial.

Judgment.
Rose, J.

An interesting case on the question of malice is *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588, especially the judgment of Parke, J., 594.

One derives assistance in considering the ultimate decision in *Archibald v. McLaren*, by referring to the unreported opinions of the Judges in the Courts below, both in the Divisional Court and the Court of Appeal ; as upon reading all the opinions one is able to clearly ascertain

Judgment.
Rose, J.

what opinions were rejected and what were adopted by the Supreme Court. I think that the result of that decision, as far as this case is concerned, is, no matter whether the witnesses were in the ordinary sense credible witnesses or not, if as a matter of fact their statements were honestly believed, that absence of reasonable and probable cause cannot be held to have been shewn simply because further inquiries might have been made or further facts might have been discovered. If the facts as they appeared to the officers of this company were sufficient to afford reasonable and probable cause for their honest belief, then it is manifest that the plaintiff has failed in shewing the absence of reasonable and probable cause, and so has failed in sustaining his claim. If it was my duty to rule that the evidence disclosed absence of reasonable and probable cause, the defendant cannot complain of the finding of the jury that the arrest was made for an indirect motive. Although it was open for them to adopt the suggestion made on behalf of the defendant that the arrest was made at the time it was made in the belief that the plaintiff was not intending to appear as a witness at the civil trial of the action brought by his wife against the company for the insurance money and that he would speedily return to Michigan and so make it difficult to arrest him, yet the evidence was open to the inference that the arrest was made when it was made either to induce a settlement which the company had been willing to make or to prevent his giving the evidence at the trial. I do not say that either of the latter suggestions was adopted by myself in considering the evidence; on the contrary, I was of the opinion that the action of the officers in causing the arrest was *bond fide*. But, as I have said, the question of malice becomes of no importance; as, to adopt the words of Parke, J., in *Mitchell v. Jenkins*, "If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable."

There must be judgment for the defendant dismissing the action with costs.

G. F. H.

[DIVISIONAL COURT.]

FRASER V. LONDON STREET RAILWAY COMPANY.

Street Railways—Foot-board on Side of Car—Invitation to Ride on—Improper Construction of Bridge—Negligence—Excessive Damages—New Trial.

On an electric car on defendants' railway, there was a step or foot-board running along the side of the car about a foot from the ground, leading to doors on each side of and at the centre and rear parts of the car, with a brass rail or rod about chest high running parallel with the foot-board for persons standing thereon to hold on by, and electric buttons on the side of the car to communicate with the conductor. The plaintiff seeing that the car was filling up rapidly, all the inside seats being occupied, and the rear platform crowded, jumped on the foot-board, the car then having started. A short distance from where the plaintiff got on was a bridge, which the car had to cross, the approach thereto being on a curve, by reason of which the plaintiff was swayed out from the car and as it entered on the bridge he was struck by one of the side posts of the bridge and thrown off and injured, the space between the post and the side of the car being only fourteen inches :—

Held, that an invitation to the plaintiff to stand on the foot-board, must be implied, and while there he was entitled to be carried safely, which the improper construction of the bridge prevented defendants doing, and which, therefore, constituted evidence of negligence.

A verdict for the plaintiff was sustained, except as to the damages, \$3,300, which were held to be excessive, and a new trial was directed unless the plaintiff consented to their being reduced to \$2,000.

The elements in assessing damages in cases of this kind considered.

THIS was an action tried before STREET, J., and a jury, *Statement.*
at London, on the 11th January, 1898.

The action was to recover damages for an injury sustained by the plaintiff by reason of the alleged negligence of the defendants, while the plaintiff was riding on one of the defendants' electric cars, standing on a step or foot-board running along the side of the car.

The evidence, so far as material, is set out in the judgments.

The learned Judge in charging the jury told them that in giving their verdict they must take into consideration the question whether or not there was an invitation by the company to the plaintiff to ride on the foot-board, and whether such invitation was limited to occasions when the car was full inside. The jury found for the plaintiff, with \$3,300 damages, for which the learned Judge entered judgment in the plaintiff's favour.

Statement.

On March 17th, 1898, the defendants moved before a Divisional Court composed of BOYD, C., and FERGUSON, J., for an order to set aside the judgment entered for the plaintiff, and for an order dismissing the action with costs, or for a new trial, or for such other relief as to the said Court might seem meet.

I. F. Hellmuth, for the defendants. The learned Judge should have non-suited the plaintiff, or what amounts to the same thing, have dismissed the action. The evidence disclosed that had the plaintiff got on the car before it started, he could have got inside the car. The fact of his getting on the car while it was in motion is a bar to his recovery. There is no invitation to get on a moving car, and certainly none to stand on the platform, and the plaintiff was there at his own risk, unless the company by receiving his fare, or in some other manner, recognized him as a passenger. The conductor never saw the plaintiff, or had any opportunity of warning him that it was dangerous to ride where he was. Even if it should be held that there is an implied invitation to ride on the foot-board, this could only arise where the car was too crowded inside to admit of any more coming in, while the evidence disclosed that there was room inside for the plaintiff had he got into the car. The company are not bound to provide for the contingency of passengers getting on the car after it has started. There was, therefore, no negligence on the defendants' part. Even if there were negligence in the mode of constructing the bridge, still the plaintiff contributed to the accident himself by standing in a dangerous place on the car: *Noble v. St. Joseph & Benton Harbor Street R. W. Co.* (1893), 98 Mich. 249; *Phillips v. Rensselaer and Saratoga R. W. Co.* (1872), 49 N. Y. 177; *Meriwether v. Kansas City Cable R. W. Co.* (1891), 45 Miss. App. 528; *Aikin v. Frankford and Southwark Philadelphia City Passenger R. W. Co.* (1891), 142 Penn. St. 47. In any event, the damages were excessive. The fair result of the evidence is that the plaintiff's injuries are not of a permanent character, and that he would be in

time cured. The very short time that took place between the time of the accident, 30th October, 1897, and the time of the trial, 11th January, 1898, is an important factor in granting a new trial, for if a new trial were granted a better opportunity would be afforded, before the case were heard again, of ascertaining whether the injuries were of the permanent character claimed for on behalf of the plaintiff. Argument.

Duncan Stuart, contra. The fact of the plaintiff getting on the car while it was in motion is of no importance, for that was in no way the cause of the accident. The object of the plaintiff in getting on the foot-board was for the purpose of reaching the middle door, and thus getting inside the car, and had not there been another person between him and the door, he could have done this, but the distance being so short between the place where he got on the car and the bridge, that he was thrown off the car and injured before he was able to effect his purpose. The plaintiff could not have got into the car by the rear door as it was too crowded. The plaintiff was properly standing on the foot-board. It is placed where it is for the purpose of passengers standing upon it. It is fitted up with a brass rail to hold on by, and electric buttons to notify the conductor when a passenger desired to stop; and there was no notice of any kind on the car to warn passengers that they were not to stand on it. Under these circumstances it was clearly a question for the jury whether or not there was an invitation from the company to stand on the foot-board, and the jury by their verdict have found that there was such invitation. If, therefore, the plaintiff had the right to stand on the foot-board, he had the right to be safely carried while on the foot-board, and it is quite clear, that there was not sufficient room between plaintiff and the post on the bridge, to enable him to be safely carried over the bridge. There was, therefore, evidence of negligence on the part of the defendants, and there was nothing to shew any contributory negligence on the plaintiff's part. There was also evidence to shew that the rails on the

Argument. bridge canted, and thus the rail on the side which the plaintiff was standing was brought closer to the post. The whole question was one for the jury, and they have found for the plaintiff, and their verdict cannot be interfered with: *Seymour v. Citizens R. W. Co.* (1893), 21 S. W. R. 739; *Wachita and Western R. W. Co. v. Davis* (1887), 16 Pac. R. 78; *Schacherl v. St. Paul's City R. W. Co.* (1889), 43 N. W. R. 837; *Omaha Street R. W. Co. v. Martin* (1896), 66 N. W. R. 1007; *Chicago City R. W. Co. v. Rood* (1895), 62 Ill. App. 550; *Citizens Street R. W. Co. of Indianapolis v. Spahr* (1893), 33 N. E. R. 446, 28 Atlantic R. 338; *Ready v. Pennsylvania R. W. Co.* (1893), 55 Fed. R. 184; *Elliott v. Newport Street R. W. Co.* (1894), 31 Atlantic Rep. 694. Then as to the damages. The question of damages is clearly one for the jury, and the Court will not interfere unless they are so excessive as to shock the conscience. Here the medical evidence for the plaintiff shewed that the plaintiff's injuries were permanent, and on this basis the damages are not unreasonable.

Hellmuth, in reply. The plaintiff by jumping hurriedly on the car after it had started, prevented the conductor from seeing him in the short time that occurred before reaching the bridge, and thus warning him of his being in a dangerous place. The evidence for the defence shewed that the rails could not have canted, because the rail on the part of the track off the bridge was in line with the rail on the bridge, which could not have been the case had the rail canted.

April 26th, 1898. BOYD, C. :—

The fact that the plaintiff jumped on the car after it was in motion does not appear to be of importance in this case. He had safely boarded the car, and the accident arose not from his manner of becoming a passenger, but from the fact that being on the car there was not safe passage through the bridge for passengers standing on the foot-board.

Then was he negligent in being where he was at the time of the injury, and is legal blame to be limited to him in exoneration of the defendants? I do not see, after reading the evidence, how this could properly be withdrawn from the jury.

Judgment.

Boyd, C.

These are the facts: the car is constructed with an outside step all along, from front to rear; and chest high from this step is a fixed brass hand-rail, obviously for the purpose of enabling passengers to steady themselves while on the step. Along the side of the car there are also four electric buttons, by which the bell to go on or stop can be sounded. The construction of the car indicates that it is meant to accommodate people outside, and the step is for this purpose as well as to enable them to enter by the front, centre and rear doors. On this day (6th September) two men at least had got on this outside step while the car was waiting to receive passengers at the base ball ground, and were there being carried as such when the plaintiff jumped on between them. One of these persons says he got on there because he could not get in at the rear platform because it was crowded. The evidence appears to shew that all the seats within were taken, though there was standing room when once one was inside. Those outside were working their way down to the rear platform with a view of getting in, when the bridge was reached some 600 feet from the starting point, and then the plaintiff not being prepared at the curve approaching the bridge, was swayed out from the body of the car, was struck on the stanchion of the bridge, twisted away from his grasp on the rail and fell some thirty feet to the ground below. The distance between the side of the car and this upright of the bridge is some sixteen inches, and probably if it had not been for the swerve of the car the plaintiff might have scraped through.

The conductor is not proved to have seen the plaintiff on the car; but it must be taken that the conductor started the car knowing that two men at least were outside passengers. It is proved also that it is a common thing, a not unusual thing, for numbers so to ride during crowded

Judgment.
Boyd, C.

seasons, at fairs and the like; and also it is proved that individual witnesses and the plaintiff have ridden outside at other times.

These matters of evidence, coupled with the make-up of the car, afford sufficient evidence of an invitation generally to ride on this outside step, and, if there was such invitation, then the obligation rested on the company to carry the passengers there with reasonable safety. Whether this was done or not in this particular case is for the jury, and to the Judge's charge there was no exception.

All the seats being occupied, the plaintiff might elect whether he would stand inside or out, in the absence of any direction by those in charge of the car, and in the absence of any notice or by-law of the company warning as to danger.

The passenger choosing the outside place might have to answer for it if he was injured by any passing vehicle, or other danger unforeseen by the company; but he was entitled to assume that the railway and the bridge were so adjusted by the company that he would not be knocked off if he stood on the step: *City R. W. Co. v. Lee* (1888), 50 N. J. Law 435, 439; *North Chicago Street R. W. Co. v. Williams* (1891), 40 Ill. App. 590, affirmed (1892), 140 Ill. R. 275; *Spooner v. Brooklyn City R. W. Co.* (1873), 54 N.Y. 230; and see judgment of Harrison, C. J., in *Blackmore v. Toronto Street R. W. Co.* (1876), 38 U. C. R. 122, at pp. 190-194.

As to excessive damages, there is difficulty in the Appellate Court interfering in any satisfactory way. In actions for tort for personal injury the amount is for the jury to determine, subject to the supervision of the Court, if unreasonably large or unreasonably inadequate: *Rowley v. London and North-Western R. W. Co.* (1873), L. R. 8 Ex. 221, 231.

A principle was laid down by Lord Esher (in a case of libel) which may be perhaps of more general application as to excessive damages. He says the rule of conduct is as nearly as possible the same as when the Court is asked to

set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only "we think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them," then they ought not to interfere with the verdict: *Praed v. Graham* (1889), 24 Q. B. D. 53. And he further says, "if the Court can see that the jury in assessing damages have been guilty of misconduct, or have made some grave blunder, or have been misled by the speeches of the counsel, these are undoubtedly sufficient grounds for interfering with the verdict."

Judgment.

Boyd, C.

In another case of libel, adverting to the test proposed by Lord Esher, the Irish Judges say that they apply the same method under a statement verbally different when they inquire whether the amount is so excessive as that no reasonable proportion exists between it and the circumstances of the case. There must be a fair and reasonable proportion between the facts of the case and the sum given. And this further is added, that the opinion of the Judge who tried the case is a matter to be taken into consideration as to whether the verdict impeached on the ground of extravagance should be allowed to stand or not: *Harris v. Arnott* (1890), 26 L. R. Ir. 55, 68, 71. See also *Reeves v. Penrose* (1890), *ib.* 141.

Again, in cases of accident this is to be considered, that juries are not to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. I quote from the language of Parke, J. who went on to say: "Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life": *Armsworth v. South-Eastern R. W. Co.* (1847), 11 Jur. 758, at p. 760, cited and approved of in *Rowley v. London and North-Western R. W. Co.* (1873), L. R. 8 Ex. 221.

In the same strain Lord Shand observes as to suffering and solatium. "All that can be given by way of direction

Judgment.
Boyd, C.

to a jury is, that they must judge fairly and reasonably between the parties, knowing that money can never afford compensation for serious injuries and much suffering, and that they must shew moderation and good sense in giving some compensation for what cannot be otherwise repaired": *McMaster v. Caledonian R. W. Co.* (1885), 13 Court of Sess. Cas., 4th ser. (Rettie), 255.

In the Scottish practice another guide is laid down, by which, unless it can be said that the verdict ought not to have been for more than one-half of the sum awarded, there is no room for interference: *Young v. Glasgow Tramway and Omnibus Co., Ltd.* (1882), 10 Ct. Sess. Cas., 4 ser. (Rettie) 242, 245.

That case is a valuable illustration of the elements to be considered in estimating what damages should be awarded for personal injury. The plaintiff, forty-five years of age, was injured by fracture of the thigh bone near the hip—was confined to her chamber for six months with great suffering and constant medical care. There was permanent injury to the leg, which would always be shorter than the other, involving the use of crutches for life, with it is said, the prospect of permanent lameness. £800, though considered by the majority of the Court as very large, was allowed to stand, being apportionable in the opinion of the Judges thus: £100 for expenses of the accident; £250 for personal suffering and injury; and £450 for three years' loss of business. Lord Shand dissented on the ground that no loss of business was proved as likely to happen, and would have reduced the amount to £500, allowing £100. to cover all outlays, and £400 for present suffering and personal injury.

In *McMaster v. Caledonian R. W. Co.*, already cited, Lord Shand adverts to a condition of affairs which obtains in this case. He says: "In cases of injuries from an accident the jury ought, unquestionably, to take into consideration everything that can be ascertained as to the state of the injured person down to the day of trial, so as to enable them, to the best of their ability, to esti-

mate the prospects of recovery; whether a complete recovery may be expected, and at what time more or less remote. The light so obtained may seriously affect the amount to be assessed as damages either favourably or unfavourably to the defendants. If the facts proved as to the history of the case down to the last shew that the recovery must be very tedious, and that even graver consequences may develop themselves than any that have yet appeared, so that for many years the injured person may be unable, or be only partially able, to earn the income which he might otherwise expect, the amount to be allowed will be all the larger. If the evidence be to the opposite effect, the amount to be allowed will be so much the less," p. 255.

Judgment.
Boyd, C.

The plaintiff, the person here injured, was a young man of twenty-two, earning as clerk in his father's warehouse \$300 a year. He was injured on 6th September, 1897, was confined to the house for a week, and then went out on crutches. These he ceased using in November, and was back at work two months after being hurt. He was not able to do as much work; has pains in the left hip joint, and an aching in the back which prevents sleep. The action was begun on 30th October, 1897, and was tried 12th January, 1898. The doctors say he is suffering from a combination of conditions resulting from the shock and fall. No bones were broken, but contusion on the back and hip. There is some atrophy, or shrinking of muscles, for want of nervous force, the result of the fall, and some inflammation from the like cause. The spinal column had a wrench, which may give pain in the future, though it will improve. The two doctors examined for the plaintiff give it as their opinion that he may to a limited extent get somewhat better, but that he will not altogether recover. The other two examined for the defendants are perhaps more decided that he has not yet had time to recover (that is, speaking of the four months that had elapsed at the trial), but that in a year or so he will make a good recovery so as to be practically as good a man as ever.

Judgment.**Boyd, C.**

The Judge's opinion is that much more was given than he would have awarded upon this evidence, and had it been in his hands \$1,000 or \$1,500 would have been the result. There is no evidence that the plaintiff will suffer any, or any great loss of income, from this cause, and the great element of danger is absent which was considered in *Church v. Corporation of Ottawa* (1894), 25 O. R. 298, 300, and afterwards as decided by Robertson, J., in the new trial before him at Ottawa, 25th June, 1896, affirmed by the Court of Appeal, but not reported. See also *Phillips v. London and South-Western R. W. Co.* (1879), 4 Q. B. D. 406, in which, after a verdict of £7,000, the Court directed a new trial because of smallness of damages in view of the permanent loss of professional business through total incapacity to attend to it. This was affirmed in appeal in *S. C.* (1879), 5 Q. B. D. 78, and upon the new trial the jury gave £17,000, which being moved against was upheld in the Divisional Court and in the Court of Appeal: *S. C.* (1879), 5 C. P. D. 280. And the matter mainly rests on the true view as to the permanence of the comparatively slight disability under which the plaintiff labours. The amount appears unduly large. It is certainly so if the plaintiff makes a speedy and satisfactory recovery, as predicted by two of the witnesses. If we grant a new trial, probably time would solve this element of uncertainty before the next trial could take place; but, preferably to this, I favour this solution, that if the plaintiff is willing to accept a down payment of \$2,000 in full of damages, that judgment should go for that amount, and costs of suit and appeal; otherwise, at the election of plaintiff, either a new trial with costs of the suit to be paid by the company, and no costs of appeal; or, that the whole amount of the verdict be paid into Court, with leave to apply therefor at the end of a year, when the Court can ascertain as to the state of the plaintiff's recovery by medical certificate or report, as may be then directed: *Belt v. Lawes* (1884), 12 Q. B. D. 356.

FERGUSON, J. :—

Judgment.

Ferguson, J.

The plaintiff brings this action to recover damages for injuries sustained by him while riding as a passenger on the defendants' railway, placing his right to recover on alleged negligence of the defendant company. In one paragraph of his statement of claim he, to a degree, particularizes the negligence of which he complains, in this way. He says they were guilty of negligence in the running and in the management of the car (the one on which he was riding), and in the control of the passengers riding thereon, and did not take reasonable and proper means to enable passengers to quickly and safely enter the car, and were guilty of negligence in constructing the car, and in building a certain bridge, so as to render it possible for a passenger properly riding in the car to be struck by the bridge, and in building the bridge in such a way that a passenger falling from the car might fall through, or over, the bridge to the river beneath, and that such negligence was the cause of the injury to him.

The defendants deny the alleged negligence: set up contributory negligence; and, as an alternative say, that the occurrence was the result of mere accident in respect of which they are not responsible.

The defendants' car was constructed with a step, or foot-board, running along the side of it, about one foot from the ground, and at or about the height of the lowest of the steps at the side of the rear end of the car for enabling passengers and others to get upon the platform at the rear, and thence through a sliding door into the car. There was also a sliding door in the side of the car, about midway between the front and rear, for the same purpose. There was a brass hand-rail, or rod, about breast high, running along the side of the car for the purpose of persons on the step holding by. This rod ran from the rear end to one side of the door in the side, and again from the other side of this door to the front of the car. There were also electrical buttons in the side of the car (outside), the same

Judgment. in appearance as those inside of the car, for the purpose of enabling passengers to communicate with the conductor.
Ferguson, J.

The plaintiff had been attending a base ball match, at which there was a large attendance. This car was there, at or near the grounds, for the purpose of carrying passengers, and the plaintiff and many others availed themselves of it to get home (into the city). The car was becoming full, and a crowd was on the back platform and steps. It is not said that there was not any more room for passengers inside, or that the crowd on the back platform and steps was so dense that one could not by any possibility get into the car by that way—so far there does not appear to be any dispute about the facts given in evidence.

The plaintiff was somewhat late in arriving at the car, and seeing matters in the condition above described, went hurriedly past the back of the car, and while the car was in motion (but not moving rapidly) got upon this step at the side and was holding by the brass rod. There was a man (Ross) between him and the sliding door in the side of the car, and another, named McLeod, between him and the rear end of the car, all standing on the step, and holding by the brass rod. These two men were, as I understand the evidence, in their positions before the plaintiff came there, and from the evidence one would reasonably conclude that each of the three had an intention of getting inside of the car.

The distance between the place at which the plaintiff got upon the car and the bridge spoken of was from 300 to 400 yards. As before stated, the car was going slowly when the plaintiff got on, but the speed was so increased by the time the car approached, or was at the bridge, that the witnesses state the speed, some at six miles, some at eight, and some as high as ten miles per hour.

The bridge was constructed with high posts on each side, and this construction was such that as the car passed over it, there was at most a space of twelve and a half inches between the aforesaid brass rod and the posts of the bridge on the side on which the plaintiff was. The car going at

this speed passed over the bridge, one of the passengers standing on this step, and holding by the brass rod, had the buttons torn off the back of his coat by the post, or posts, of the bridge. The plaintiff was struck by the posts and knocked off the car. He fell a distance of twenty-five to thirty feet to the ground below, and was injured: for such injury he claims damages. Judgment.
Ferguson, J.

Whatever negligence there may have been on the part of the plaintiff in hurrying and getting upon the car when in motion—if it be assumed that he was as a passenger properly on the step, and holding by the brass rod—such negligence, if any, was past, and could not have been the cause of or contributed to the misfortune. As to whether the plaintiff, as a passenger, was, or was not, rightly on this step, and holding by the brass rod, much seems to depend upon a question agitated at the trial, namely, whether or not, by the construction and make-up of the car, and all that appeared as emanating from the defendants, there was what has been called in many decisions, an “invitation” to passengers to ride upon this step. There had been no communication between the plaintiff and the conductor of the car. There was evidence that people had been frequently seen riding upon the step, but not across this bridge. It was contended that these occasions were only when the car was full inside.

From what appears to have been said, and what took place at the time of the motion for a non-suit, and what was said by the learned Judge in his charge, it is plain that this question as to the existence or not of the invitation, and whether limited or not to cases when the car inside was full, was left to the jury, and their verdict, as I think, involves a finding that the invitation did in this instance exist; and I may here say that in this finding, considering the evidence as best I have been able, I fully agree. I need not, as I think, further detail the facts as they existed. I am unable to see any conclusion other than the one that there was such an invitation could on the evidence be arrived at, and assuming that there was the invitation, it

Judgment. follows that, in all the circumstances, the plaintiff was, so far as the liability of the defendants has concern, properly riding as a passenger when he was upon this step holding by the brass rod ; and assuming this to be so, it appears to me to be plain that there must have been negligence on the part of the defendants in the construction of the bridge and car to be used for the purpose, and in the manner in which they were used on this occasion, and to me it seems manifest that this negligence was the cause of the misfortune.

As to the allegation that there was negligence of the defendants in the management of their passengers, it may simply be said there is not evidence of any effort having been made to get the passengers inside of the car before coming to this bridge, or of any warning having been given of the danger at the bridge. If such warning had been given, possibly the accident would not have happened. On the whole case, as to negligence, I am of the opinion that contributory negligence of the plaintiff is not shewn, and that negligence of the defendants which was the cause of the disaster and injury to the plaintiff is shewn, and that the finding of the jury is, in these regards, quite right, or at all events is well supported by evidence.

Then as to the amount of the damages awarded, \$3,300. It is contended that this sum is extravagantly large, and that for this reason there should be a new trial.

This is a subject that is often, if not generally, one of difficulty and delicacy. It is stated in the American and English Encyclopædia of Law, vol. 16, p. 582, that excessive or inadequate damages awarded by a jury, as a ground for a new trial, is but a branch of the more general ground that the verdict is contrary to the evidence. For it is evident that, if the damages are either excessive or too small, the verdict must be contrary to the evidence. It is further stated, at p. 585, that where there is no legal measure of damages, and where the damages are unliquidated, and the amount is referred to the discretion of a jury, the Court will not ordinarily interfere, and that it is

incumbent upon the Court to forbear any encroachment upon the functions of the jury in this particular, save in the strongest cases of injustice; and that no mere difference of opinion justifies an interference with a verdict for this cause, but the amount must be so out of the way as to evince passion, prejudice, partiality, or the like, on the part of the jury. Judgment
Ferguson, J.

In the present case the difficulty and delicacy in considering the evidence are much increased owing to the short period that intervened between the time of the misfortune and injury to the plaintiff and the time of the evidence being given (only from the 30th October, 1897, to the 11th of January, 1898), the injuries to the plaintiff being of such a character apparently that time would be very material to ascertain the true extent of them, or rather the ultimate effect of them, whether permanent or not, and if permanent the extent of the permanent injury, and to what degree it would interfere with what would otherwise be the daily life and occupation of the plaintiff.

After a perusal of the evidence, I am impressed with the idea that the plaintiff was not so greatly injured as one would expect or anticipate from the circumstances of the misfortune and the fall that he undoubtedly had. At the time of the trial he was, however, much afflicted by the injury and the consequences of it.

Dr. Stott, called for the plaintiff, said that he saw no improvement in two months; that in his opinion the injuries were permanent; and that in his experience in such cases he had never known a patient to become perfectly well.

Dr. McLaren, also called for the plaintiff, said that in his judgment the injuries to the plaintiff were of a permanent character.

Dr. McCollum, called for the defendants, said that the plaintiff had *traumatic neurosis*, from which he would recover; that the plaintiff's sciatic nerve was injured by the fall, but that he would recover, but had not at that time recovered from it.

Judgment. Dr. Moore, also called for the defence, says that the plaintiff's present trouble is *traumatic neurosis*; and that, in his opinion, there will be a recovery in about a year or a year and a half.

The medical gentlemen called for the plaintiff attribute a certain shrinking of a muscle in the left hip or thigh (not to follow the professional terms) to atrophy, while those called for the defendants attribute this to want of use of the muscle.

From the foregoing extracts (and I have purposely refrained from stating much of the medical evidence) it will readily be seen what difficulty there is in exercising one's judgment in respect to the injuries sustained by the plaintiff, and the amount of damages that he ought to recover.

The plaintiff is twenty-two years of age, and employed as a bookkeeper in his father's office; the amount of the damages is, as above stated, \$3,300.

The learned Judge, before whom the action was tried, is of the opinion (as I learn) that less than one-half of this sum would have been sufficient. The opinion of the trial Judge is always considered of great importance, but of itself not enough on which to grant a new trial for excessive damages. After what I think had been a careful perusal and consideration of the evidence, and endeavouring to encounter the difficulty before alluded to, I have arrived at the opinion that the damages are greatly excessive, so much so as to lead one to the conclusion that there was bias in favour of the plaintiff, or perhaps prejudice against the defendant corporation. I have great delicacy in stating this last, and only do so because I think it a matter of duty so to do.

The Chancellor, with his usual and unabating assiduity, has referred to and discussed a number of cases on the subject. These comprehend what may be called the pith, at least, of the late cases bearing on the question, and it seems not necessary for me to follow in his footsteps, or to seek to refer to other cases. He has also formulated a plan of dealing with the motion before us, which at first I

thought complicated, but which, after having given it some consideration, I am now prepared to adopt. I agree in the method of dealing with the motion stated by the learned Chancellor in the concluding part of his judgment, which I have had the opportunity of perusing.

Judgment.
Ferguson, J.

G. F. H.

[DIVISIONAL COURT.]

ALDERICH

V.

HUMPHREY AND YOUNG.

Constable—Arrest—Warrant of Commitment—Execution Outside of Magistrate's Territorial Jurisdiction—Absence of Backing—Insufficient Notice of Action—R. S. O. (1887) ch. 73—24 Geo. II. ch. 44, sec. 6.

It is not necessary to the execution of a warrant of commitment by a constable that he should actually lay hands on or physically interfere with the person to be arrested. It is an arrest if the person to be arrested asks for and peruses the warrant and agrees to accompany the constable: and, *semble*, it is sufficient if he agrees to accompany the constable on his statement that he has the warrant in his possession.

A constable executing a warrant in good faith outside of the territorial jurisdiction of the magistrate issuing the same, without procuring the indorsement of a magistrate of the county where the arrest is made, is entitled to notice of action and to the protection of R. S. O. (1887), ch. 73.

A notice of action which wrongly states the name of the township in the county in which the arrest took place is insufficient.

A constable in an action against him for wrongfully arresting the plaintiff without a proper indorsement of the warrant by a magistrate of the county in which the arrest is made is entitled to plead "not guilty by statute."

A constable is not entitled to the protection of 24 Geo. II. ch. 44, sec. 6, unless there is want of jurisdiction in the magistrate issuing the warrant.

MOTION by the defendant Young to set aside the verdict of the jury herein and judgment thereon against him, in an action tried before ROBERTSON, J., and a jury at Hamilton, on January 14, 1898.

Statement.

W. W. Osborne, for the plaintiff.

C. W. Colter, for the defendants.

Statement. The action was brought by John Alderich against Norris Humphrey a magistrate and Hisely Young a constable under the circumstances hereinafter set out and was dismissed by the trial Judge as against Humphrey on the finding of the jury that he was unaware of the arrest of the plaintiff in the county of Wentworth, but on the finding of the jury judgment for seventy-five dollars was rendered against the constable.

The following facts are taken from the judgment of ARMOUR, C.J., in the Divisional Court.

The plaintiff was convicted of an assault committed at the village of Caledonia in the county of Haldimand, by the defendant Humphrey, a justice of the peace for the county of Haldimand, and was ordered to pay one dollar fine and five dollars and eighty-five cents for costs.

And thereafter the defendant Humphrey issued his warrant of commitment addressed to the defendant Young, constable, and to all or any of the constables or other peace officers in the county of Haldimand and to the keeper of the common gaol of the said county at Cayuga.

Under this warrant the defendant Young, as was alleged, arrested the plaintiff at the township of Glanford in the county of Wentworth and carried him, as was alleged, by virtue of the said warrant to the said defendant Humphrey at the village of Caledonia in the county of Haldimand, to whom the plaintiff paid the fine and costs and the defendant Young's charges as constable and was discharged.

And for this alleged trespass to the plaintiff, this action was brought against the defendant Young and seventy-five dollars damages recovered therein against him.

Notice of this action was given to the defendant Young, but it was stated therein that the alleged trespass was committed at the township of Ancaster in the county of Wentworth, instead of at the township of Glanford, in the county of Wentworth, where it really was committed.

The defendant Young moved for a new trial on the following grounds:—

1. That the learned Judge erred at the trial in directing the jury, that the defendant Young arrested the plaintiff in the township of Glanford instead of instructing the jury as to the law and leaving them to find as a fact, whether the defendant Young arrested the plaintiff in the said township of Glanford on the occasion complained of or not. Statement.

2. That the evidence given at the trial did not warrant the conclusion that the defendant Young arrested the plaintiff in the county of Wentworth and certainly proved that the plaintiff was not arrested in the township of Ancaster in the county of Wentworth as stated in the plaintiff's notice of action.

3. That the learned Judge erred at the trial, in not directing the jury that if the defendant Young acted in the honest belief that he was discharging his duty as a constable and was not actuated by any improper motive he was entitled to notice of action and that no sufficient notice of action was given.

4. That the damages awarded were under the circumstances excessive.

5. And on grounds of nondirection and misdirection by the learned Judge as appeared in his charge to the jury.

The motion was argued on March 9th, 1898, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.

E. D. Armour, Q. C., for the defendant Young contended that the trial Judge should have stated the law and left it to the jury to find the fact instead of telling them the arrest was made in a wrong county; that the evidence did not shew an arrest, for while it would not be necessary to lay hands on in the county where the magistrate had jurisdiction, as the prisoner might submit to the warrant without force, there could be no arrest in a county where the magistrate had no juris-

Argument. diction without laying on hands, which was not done in this case, for the warrant not being operative there could be no submission to it, and to constitute an arrest there must, therefore, be an actual taking; citing *Arrow-smith v. LeMesurier* (1806), 2 B. & P. N. R. 211; *Berry v. Adamson* (1827), 6 B. & C. 528; *Russen v. Lucas* (1824), 1 C. & P. 153; Tomlin's Law Dictionary, and American and English Encyclopædia of Law under "Arrest"; that the damages were excessive: R. S. O. (1887) ch. 73, sec. 21; that the constable was entitled to notice of action and as the one given was incorrect there was no notice, and if none the action was not against him, *qua* constable, so there was no trespass if he did not touch the plaintiff; and that in any event it should have been left to the jury to say whether he was acting *bond fide* in the belief that he was merely doing his duty.

W. W. Osborne, contra, for the plaintiff, contended the question of arrest or no arrest was not taken from the jury although the Judge ventured his opinion: citing 2 Roscoe's Nisi Prius Evidence, 16th ed., p. 920; that the evidence shewed Young was a constable and had a warrant with him and informed the plaintiff he had; and that in any event the notice of action was sufficient, citing *Jones v. Grace* (1889), 17 O. R. 681.

April 7th, 1898. The judgment of the Court was delivered by

ARMOUR, C.J.:—

If the plaintiff's evidence had shewn that there was an arrest in the county of Wentworth and the defendant Young's evidence had shewn that there was no arrest there, the learned Judge should have left it to the jury to say whether or not there was an arrest there, instructing them as to what constituted an arrest.

Here it is clear that the plaintiff's evidence shewed that the defendant Young arrested him in the county of Went-

worth and it is also clear in my opinion that the defendant ^{Judgment.} Young's evidence shewed that he arrested the plaintiff in ^{Armour, C.J.} the county of Wentworth and this being so the Judge rightly assumed that the defendant arrested the plaintiff there and so told the jury as he was entitled to do.

The plaintiff had been told by his uncle, one Robert Smith, that he had met the defendant Young on the road who told him that he had a warrant of commitment for the plaintiff.

The account the defendant Young gave of the alleged arrest was as follows:—

Q. Did you make any attempts to execute this warrant? A. Well, I went out to Glanford to seek him.

Q. Had you the warrant with you? A. Yes.

Q. With a horse and buggy? A. Yes, I went the first day to see him and met Mr. Smith.

Q. Where did you go the first day? A. Out to Glanford.

Q. What next do you say? A. I went out to Glanford the next day again.

Q. Had you the warrant with you then? A. Yes.

Q. Where did you go? A. I went down to a farmer's by the name of Mr. Patterson.

Q. You found him at Patterson's? A. Yes.

Q. At work? A. Yes, threshing.

Q. What took place? A. When I got to the barn I asked Mr. Iles where Mr. Alderich was, and he pointed him out. I went to Mr. Alderich and he asked me what kind of a paper I had for him and I said a warrant of commitment.

Q. What was said then? A. He said he would like to see it and I walked down behind the water tank on a waggon and took it out and he read it.

Q. Is this the warrant that he read? A. Yes, that is the same paper. He read the warrant of commitment and he said—All right I will get my coat, I will ride out with you and I will get George Reid to drive the rig to O'Reilly's:

Judgment. Q. What was done then? A. He got his coat on and we started out and I stopped to talk with Mr. Iles and he went on fifty or sixty yards and got into my rig and waited till I came.

This account so given by the defendant Young in my opinion shewed an arrest, and I would go so far as to say that if the defendant Young had merely told the plaintiff that he had a warrant of commitment for him without shewing it to him and the plaintiff upon being so told had gone with him, that would have been an arrest.

In *Homer v. Battyn et al.*, B. R. H. 12 Geo. 2, cited in Buller's N. P. 62 b., it is said, "if the bailiff who has a process against one, says to him when he is on horseback, or in a coach, 'You are my prisoner, I have a writ against you,' upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process: but if instead of going with the bailiff, he had gone or fled from him; it could be no arrest unless the bailiff had laid hold of him."

Arrowsmith v. LeMesurier (1806), 2 B. & P. N. R. 211, relied on by defendants' counsel was overruled by *Warner v. Riddiford* (1858), 4 C. B. N. S. 180, following *Grainger v. Hill* (1838), 4 Bing. N. C. 212.

Russen v. Lucas (1824), R. & Moo. 26; 1 C. & P. 153, is distinguishable: for there the officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you," Hamer replied "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away. Abbott, C.J., said "Mere words will not constitute an arrest; and if the officer says, 'I arrest you' and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete." See also *Pocock v. Moore* (1825), R. & Moo. 321; *Berry v. Adamson* (1827), 6 B. & C. 528, is also distinguishable for the officer's man had not the warrant with him nor did Berry go with him..

In *Chinn v. Morris* (1826), 2 C. & P. 361, Best, C.J., Judgment, said, at p. 362, "I should think it an imprisonment, if a Armour, C.J. constable told me that I must go to Union Hall; for I should know that if I refused, he would compel me." In *Reynolds v. Matthews*, 7 Dowl. 580, Littledale, J., said, at p. 581, "First, as to whether there has been an arrest; it appears, that in March last the sheriff's officer had a warrant to arrest the defendant; that he met him in the street, and told him he had a warrant against him, that they then both went to the defendant's house, and that the defendant sent for two persons who came and executed the bail bond; and that the whole time occupied in that proceeding did not exceed fifteen or twenty minutes. Several cases were cited as to what constituted an arrest, and there are some nice distinctions between them; but without considering them particularly, neither of them is exactly like the present, and, on the whole, I think there was an arrest in this case." See also *McIntosh v. Demeray* (1849), 5 U. C. R. 343; *Morse v. Teetzel* (1855), 1 P. R. 369; *Regina v. Nugent* (1868), 11 Cox C. C. 64.

The defendant Young was not entitled for what he did to the protection of the Act 24 Geo. II. ch. 44, sec. 6*, for this provision was made for the protection of constables acting in obedience to a warrant issued by a justice without authority as pointed out in *Parton v. Williams* (1820), 3 B. & Ald. 330, and in *Hoye v. Bush* (1840), 1 M. & G. 775.

The defendant Young was in my opinion acting in good faith in making the arrest complained of, and there was no evidence whatever to the contrary; he shewed the plaintiff the warrant under which he was proposing to act and read it to him or allowed him to read it, and there is no pretence upon the evidence, that he was acting otherwise than with the *bond fide* intention of executing the warrant. He made the mistake, however, of executing it without first

* The effect of that provision of the statute is, that in a joint action against a justice and a constable for anything done under the justice's warrant, on proof of the warrant, notwithstanding want of jurisdiction in the justice, the jury shall find for the constable.

Judgment. procuring the endorsement of it by a justice of the peace
Armour, C.J. for the county of Wentworth under the provisions of sections 565 and 844 of the Criminal Code.

He was, therefore, in my opinion, entitled to the protection of the Act R. S. O. (1887) ch. 73, and to notice of action. See *Sinden v. Brown* (1890), 17 A. R. 173; *McGuinness v. Dafoe* (1896), 23 A. R. 704, and the cases therein cited by my brother Osler, at p. 712, to which may be added *Hughes v. Buckland* (1846), 15 M. & W. 346.

Notice of action was given, but it was clearly insufficient, for it stated that the arrest took place in the township of Ancaster in the county of Wentworth, instead of in the township of Glanford in the county of Wentworth: *Madden v. Shewer* (1845), 2 U. C. R. 115; *Cronkhite v. Sommerville* (1846), 3 U. C. R. 129; *Parkyn v. Staples* (1869), 19 C. P. 240.

I do not see why the defendant Young was debarred from pleading not guilty by statute to the 8th paragraph of the statement of claim, which alleged the arrest in the county of Wentworth and out of the county of Haldimand in the face of the statutes 7 James I. ch. 5, and R. S. O. (1887), ch. 73; and the pleadings must now be amended by allowing such plea to the eighth paragraph or a plea of want of notice of action thereto.

If there had been any evidence to warrant such a course, the plaintiff might have required the jury to be asked to find that the defendant Young did not act in good faith in making the arrest, but there was no such evidence: *Allen v. McQuarrie* (1879), 44 U. C. R. 62; *Armstrong v. Bowes* (1862), 12 C. P. 539.

In my opinion the action against the defendant Young must be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

IN RE REGINA EX REL. HALL V. GOWANLOCK.

Municipal Elections—Quo Warranto—Concurrent Motions in High and County Court—Prohibition—Injunction—Collusion—R. S. O. ch. 223, secs. 219, 227.

By section 219 of the Municipal Act, R.S.O. ch. 223, jurisdiction is given respectively to a Judge of the High Court, the senior or officiating Judge of the County Court, and the Master in Chambers to try the validity of a municipal election, and by section 227 when there are more motions than one all the motions shall be made returnable before the Judge who is to try the first of them.

Two motions by different relators to try the validity of the same election were made returnable, the first of them before the Master in Chambers and the other before the County Judge who, notwithstanding objections, proceeded with the motion before him and decided that the proceedings before the Master in Chambers were collusive, when the County Judge was prohibited from further proceeding by an order made by a Judge of the High Court sitting in Chambers:—

Held, that the County Court Judge having equal and concurrent jurisdiction in respect of the matter with the other named officials, a Judge of the High Court sitting in Chambers could not under the circumstances prohibit him from proceeding with the trial. STREET, J., dissenting.

Semble, the County Court Judge who, without knowledge of the prior proceedings had granted a fiat for like proceedings, had jurisdiction on the return thereof to inquire whether such prior proceedings were collusive, and if so to disregard them.

THIS was an appeal from an order of prohibition Statement. directed to the Judge of the County Court of York, and made by FERGUSON, J., under the following circumstances:

At an election for alderman for the sixth ward of the city of Toronto, held on the 12th day of March, 1898, the relator and the defendant were candidates and the defendant was returned.

On the 16th day of March, 1898, the Master in Chambers on the relation of one Alanson C. Winton by his solicitors, Gibson and Snider, granted his fiat under section 220 of the Municipal Act, R. S. O. ch. 223, authorizing the relator to serve the notice of motion thereto annexed to determine the validity of the election of the defendant. The notice "thereto annexed" was returnable eight days after service before the Master in Chambers, and asked to have the election declared invalid upon the

Statement. ground of the want of the requisite property qualification by the defendant.

On the 21st day of March, 1898, the senior Judge of the County Court of the county of York on the relation of James Harvey Hall by his solicitors, DuVernet, Jones and Woods, granted his fiat under section 220 of the Municipal Act, R. S. O. ch. 223, authorizing the last mentioned relator to serve a notice of motion in the nature of a *quo warranto* to determine the validity of the election of the defendant. The last mentioned notice was returnable eight days after service before the Judge of the County Court and asked to have the election of the defendant declared invalid, on the ground of the want of the requisite property qualification by the defendant, and to have it declared that the last mentioned relator was duly elected at the said election.

On the 25th day of March, 1898, the notice in the Winton case was returnable before the Master in Chambers, and the solicitors for Winton and the defendant being present and one of the solicitors for Hall happening to be in Chambers, the following order was made by the Master in Chambers in the Winton case: "Upon the return of a notice of motion in the nature of a *quo warranto* to determine the matter of the validity of the election of the respondent herein this day before me there appeared one Sidney Wood, solicitor for the relator James Harvey Hall, in another motion to determine the validity of the same election of the respondent herein, and requested that all proceedings herein be stayed by reason of the dependency of the said motion in the nature of a *quo warranto* to determine the matter of the validity of the same election of the respondent herein returnable on Friday, the 1st day of April instant, before His Honour the senior Judge of the county of York, and alleged that the proceedings herein were collusive as between the relator and the respondent. Upon hearing what was alleged by counsel for the relator herein, the said James Harvey Hall, and the respondent, and it appearing that the motion return-

able this day before me is the first of the said motions, and counsel for the relator and respondent herein agreeing that all proceedings against the respondent upon the relation of James Harvey Hall might be considered as in this Court and be argued and tried fully and completely before me, I direct that this motion be enlarged until Monday, the 28th day of March instant, at 11 o'clock, and order that the same James Harvey Hall be at liberty to then appear and take all necessary steps to prosecute his said motion before me as provided by the Municipal Act R. S. O. ch. 223, in conjunction with this motion, and I direct the respondent herein to serve this notice upon the solicitors for the said James Harvey Hall and for the relator herein." Statement.

On the 28th day of March, 1898, in Chambers, the said Wood being present was asked by the Master if he were ready to proceed, to which he replied that he had no instructions. The Master thereupon enlarged the motion in the Winton case till Saturday, the 2nd day of April, the notice of motion in the Hall case being returnable on Friday, the 1st day of April.

On Friday, the 1st day of April, the solicitor for the defendant appeared before Mr. Justice MacMahon in Chambers, and upon his own affidavit setting forth the proceedings above recited, and stating that the senior Judge of the county of York proposed to proceed to try the validity of the said election upon the notice given in the Hall case at 2.30 p.m. on that day, and stating also that at the time of the issue of the fiat by the County Judge and of the issue and serving of the notice of motion on the relator James Harvey Hall, both the Judge and James Harvey Hall were not aware of the then existing other notice of motion having already been issued and served some days before the time at which the second fiat was granted, obtained from the said justice an order prohibiting the senior Judge of the county of York and James Harvey Hall from further proceeding to try

Statement. the validity of the said election till Monday, the 4th day of April, 1898, or until a motion be made on that day to continue the said prohibition should have been made and determined. At 2.30 p.m. on that day the relator Hall produced affidavits before the County Court Judge tending to shew that the proceedings in the Winton case were collusive, and after argument as to whether the Judge of the County Court had power to try the case, that Judge gave judgment as follows: "I am of the opinion that there is *prima facie* evidence that the first application before Mr. Winchester is collusive, and that the irregularities manifest on the face of these proceedings as set out in the affidavits before me are of such a nature and character as to support and confirm the suggestion that the proceedings are collusive and the irregularities are intended to produce an abortive result. This being the case, and the first proceedings being also taken in another Court, I am of opinion that my jurisdiction is not ousted to try and determine the present application."

Upon the Judge of the County Court pronouncing this judgment, counsel for defendant asked him if he intended to proceed to try the case, and upon his saying that he did he produced and served him with the order of prohibition.

On Monday, the 4th day of April, 1898, on motion to continue the prohibition before Mr. Justice Ferguson in Chambers, it was ordered that James Harvey Hall and the senior Judge of the County Court of the county of York should be and they were thereby prohibited from further proceeding with the notice of motion in the County Court of York, but that the said motion might, on consent of the parties thereto, be made returnable before the Master in Chambers. And it was further ordered that the costs of the motion and of the motion before Mr. Justice MacMahon should be paid by James Harvey Hall to James Gowanlock forthwith after taxation thereof, the learned Judge delivering the following judgment:—

April 7th, 1898. FERGUSON, J. :—

Judgment.

Ferguson, J.

The motion is for an order continuing the writ of prohibition granted by my brother MacMahon, embracing also, by leave, a substantive motion for a writ of prohibition against further proceedings in the County Court before the senior Judge thereof.

There are two motions pending to try the validity of the election of the above named defendant as an alderman of the city of Toronto—one before the Master in Chambers in the High Court, and the other before the learned Judge of the County Court.

It is clear that this motion pending before the Master in Chambers was the first of the two motions, and I do not hear of any other motion for the same purpose. So far as one can see by a perusal of the papers, each of the motions rests upon substantially the same grounds, or rather, alleged grounds.

Such a motion may be made before a Judge of the High Court, or before the Master in Chambers, or before the Judge of the County Court: R. S. O. ch. 223, sec. 220, sub-sec. 4.

Section 227 is as follows: "Where more motions than one are made to try the validity of an election all the motions shall be made returnable before the Judge who is to try the first of them, and the Judge may give one judgment upon all or a separate judgment upon each one or more of them as he thinks fit."

It is an element here that when the learned Judge of the County Court gave his fiat or leave to move it was known that the motion was pending for the same purpose before the Master in Chambers in the High Court, yet the motion before him (the Judge of the County Court) was not made returnable before the Master in Chambers, but before himself.

In or during the proceeding before the Master in Chambers some things took place respecting the relator here intervening, but these are perhaps not important.

Judgment. The learned Judge of the County Court proceeded with the motion before him, and notwithstanding objections made, decided that there was before him *prima facie* evidence that the first application (the one before the Master in Chambers) was collusive and that the irregularities manifest on the face of the proceedings, as set out in the affidavits before him, were of such a nature and character as to support and confirm the suggestion that the proceedings before the Master in Chambers were collusive and that the irregularities were intended to produce an abortive result, and that such being the case and the first proceedings being also taken in another Court he was of opinion that his jurisdiction was not ousted to try and determine the application before him, thereby, if by nothing else, indicating his intention to proceed upon the motion. In this—and I say it with the greatest respect—my view differs from that taken by the learned Judge. The 227th section seems to me to be positive and unequivocal in its terms. Collusion in respect of the first motion may be suggested, suspected and apparently shewn or partly shewn, and it may be suggested that apparent irregularities were intentional and with the view of bringing about an abortive result, so far as that motion had concern, but I fail to see how all this, even if it were assumed that all should be established, would or could prejudicially affect a motion by another relator returnable before the same Judge, for his duty would be to pronounce either one judgment upon all the motions before him, or a separate judgment upon each one or more of them, and if one motion failed for irregularity or collusion it would not at all follow that another or the others would for such reason fail also.

I cannot see that the case falls under the doctrine or authority of *Home v. Earl Camden* (1795), 2 H. Bl. 533, nor do I think the case *Regina ex rel. McLean v. Watson* (1864), 1 C. L. J. N. S. 71, sufficiently clear in its terms to be a precedent for the course taken by the learned Judge. There the Judge thought it entirely clear that the election

could not stand on account of an existing bond to the corporation, and the learned Judge said he did not think he should withhold his judgment by reason of the alleged pendency of the other motion. The case seems not fully or well reported. If the course pursued here were to be generally adopted it seems to me that the 227th section, an enactment in clear and unequivocal terms, would be as generally disregarded, and there might not be a certainty as to the result in a given case but only conflicting decisions.

Judgment.
Ferguson, J.

After having perused all the documents left with me and considered as well as I have been able all the authorities referred to, I am of the opinion that although the learned Judge had jurisdiction in the premises at the commencement, yet when he departed from what I think was the course he was bound to pursue, by not making the motion before him returnable before the Judge who was seized of the first motion and going on regardless of the existence of the first motion, he was proceeding without jurisdiction, and I do not think that the evidence here shews that those contending that the motion should have been made returnable before the Master in Chambers waived the right to object to the jurisdiction. Counsel for this motion assents to the motion before the County Court Judge being now adjourned or transferred so as to be dealt with by the Master in Chambers.

I am of the opinion that the prohibition should go, and I suppose the costs of the motion will follow.

On April 13th and 14th, 1898, the relator J. H. Hall moved by way of appeal from the above order of FERGUSON, J., on the ground that prohibition does not lie from a Judge of the High Court sitting in Chambers to the senior Judge of a County Court in a proceeding of this character, the said Judges being endowed with an equal and concurrent jurisdiction under the statute R. S. O. ch. 223, sec. 219; and on other grounds appearing in the report of their argument.

Argument.

DuVernet and Woods, for the relator J. H. Hall, contended that collusion having been proved the County Court Judge was justified in disregarding the proceedings in the High Court: *Regina ex rel. McLean v. Watson* (1864), 1 C. L. J. N. S. 71; *Regina ex rel. Patterson v. Vance* (1871), 5 P. R. 334; *Kelly v. Cowan* (1860), 18 U. C. R. 104; *Regina v. Alderson* (1839), 11 A. & E. 3; that prohibition at any rate was only available where there was no other remedy, and here there was a right of appeal: Wood on Prohibition, 2nd ed., p. 106; High on Extraordinary Legal Remedies, 2nd ed., p. 610, sec. 770; *Regina ex rel. Grant v. Coleman* (1882), 46 U. C. R. 175, 7 A. R. 619; *Regina ex rel. O'Dwyer v. Lewis* (1881), 32 C. P. 104; *Home v. Earl Camden* (1795), 2 H. Bl. 533, at p. 536; *Forster v. Forster* (1863), 4 B. & S. 187; that if prohibition would go to a County Court Judge, one Judge could prohibit the other; that the defendant only produced the prohibition order after the Judge had found collusion and had by his conduct acquiesced; that the proceedings before the Master in Chambers were a nullity and could be disregarded: Harrison's Municipal Manual, 5th ed., p. 198; that in any case the proper practice was to move for a stay of proceedings: *King v. Cousins* (1837), 7 A. & E. 285; and that when the jurisdiction of the Court depends on any point of fact, the evidence will not be reviewed: *In re Long Point Company v. Anderson* (1891), 18 A. R. 401, at p. 408.

A. H. Marsh, Q.C., and *G. G. S. Lindsey*, for the defendant, contended that they were entitled to such form of relief as the justice of the case required, whether prohibition or not: that *Regina ex rel. McLean v. Watson*, was a pure question of law, and no precedent here; that in finding collusion in the High Court proceedings, the County Court Judge was transcending his jurisdiction; that a right of appeal does not take away a right of prohibition; that prohibition lies to all inferior Courts from the High Court: Shortt on Information, Black ed., pp. 431, 436, 446; that R. S. O. ch. 223, sec. 227, did not help the appellant;

that an opportunity was given to the County Court Judge to decide that he had no jurisdiction, and when he decided he had jurisdiction, that was the proper time to use the prohibition order. Argument.

April 29th, 1898. ARMOUR, C. J. [after stating the facts of the case as above] :—

I am of the opinion that the order appealed from is wrong and should be set aside.

A Judge of the High Court, the senior or officiating Judge of the County Court of the county in which the election has taken place and the Master in Chambers have each equal jurisdiction and authority with the others of them to try the validity of an election under the Municipal Act, and this being so I do not think that there was any power in the Judge in Chambers either to prohibit or enjoin the Judge of the County Court from proceeding with the trial of the validity of this election.

Leaving the provision of the Judicature Act hereafter referred to out of the question, if this controversy had arisen between two Judges of the High Court it would seem impossible to hold that a third Judge of the High Court sitting in Chambers could prohibit the one acting in the manner in which the County Court Judge was acting in this case.

The provision of the Judicature Act that no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction would seem to apply to prevent the Master in Chambers from being prohibited in case he had been in the position of and assuming to act as the County Court Judge did in this case, and it would be an anomaly were the County Court Judge in such case subject to prohibition and he not.

No authority was cited in support of the power to make the order appealed from. It is true that in *Warner v. Suckerman* (1615), 3 Buls. 120, Coke said, "We here in this

Judgment. Court may prohibit any Court whatsoever if they trans-
Armour, C.J. gress and exceed their jurisdiction, and there is not any Court in Westminster Hall but may be by us here prohibited if they do exceed their jurisdictions, and all this is clear and without any question," but this view of the power of the Court has never since been concurred in.

Lord Chief Justice Cockburn, in striving to uphold the right to prohibit in *Martin v. Mackonachie* (1878), 3 Q. B. D. 730, at p. 747, said, "For it is the province of this Court to restrain all tribunals not forming part of the High Court of Justice or having appellate jurisdiction over it, within the limits of their respective jurisdictions;" and here it will be seen that he excludes from prohibition tribunals forming part of the High Court of Justice.

Ex parte Cowan (1819), 3 B. & Ald. 123, where prohibition was sought to the Lord Chancellor sitting in Bankruptcy, Abbott, C.J., said, at p. 130, "We wish not to be understood as giving any sanction to the supposed authority of this Court to direct a prohibition to the Lord Chancellor sitting in Bankruptcy. * * If ever the question shall arise the Court whose assistance may be invoked to correct an excess of jurisdiction in another will without doubt take care not to exceed its own."

In re New Par Consols (Limited) (1898), 14 Times L. R. 287, was an appeal from the order of Bigham, J., directing that a writ of prohibition should issue to the County Court of Truro. Proceedings had been taken in that Court for the winding-up of a company called the New Par Consols (Limited), of which company Gregory was one of the directors, and in the course of such proceedings an order had been made by the County Court Judge on Gregory to submit and verify a statement of the affairs of the company. Gregory having failed to comply with the order, the County Court Judge held him to be guilty of contempt, and made an order for his committal to prison. One of the grounds of the application was that the order calling upon him to furnish an account was not in accordance with the power prescribed by the County Court rules,

and, further, that it did not bear an endorsement as according to the rules it ought to have done, stating that if he did not comply with the order he would be liable to be sent to prison. The Court allowed the appeal on the ground that the County Court had jurisdiction to wind up the company, and sec. 1, sub-sec. 6, of the Companies' Winding-up Act said that every Court having jurisdiction to wind up a company, should for the purposes of that jurisdiction, have all the powers of the High Court.

Judgment.
Armour, C.J.

This decision seems to support the proposition that as the County Court Judge has equal jurisdiction and authority with a High Court Judge to try the validity of an election under the Municipal Act, and as a Judge in Chambers could not prohibit or enjoin a High Court Judge exercising that function, neither could he prohibit or enjoin a County Court Judge.

I am of opinion also that there was no such want of jurisdiction or excess of jurisdiction as warranted either the order made or an injunction. The Judge of the County Court had jurisdiction to try the validity of the election. It is not disputed that he had a right to grant his fiat as he did; he had nothing to do with the notice of motion that was given by the solicitors, and it was their act making it returnable before him. Upon its return he had jurisdiction to enquire and determine whether there was a previous motion and before whom returnable, and whether it was a real motion or a pretended and collusive one; and if he found that it was a pretended and collusive one it was no motion at all and not made to try the validity of the election, and so would not stand in the way of his trying the validity of the election: *Girdlestone v. Brighton Aquarium Co.* (1878), 3 Ex. D. 137; *S. C.* (1879), 4 Ex. D. 107; *Regina ex rel. McLean v. Watson* (1864), 1 C. L. J. N. S. 71; *Regina ex rel. Patterson v. Vance* (1871), 5 P. R. 334.

The Judge of the County Court received affidavits to shew collusion and found a *prima facie* case of collusion, but Winton was not before him and was not bound by

Judgment. what took place, but the order for prohibition was granted before the County Court Judge entered upon the matter on the return of the notice, and while he still had authority to enquire and determine as above stated.

Armour, C.J.

I am also of opinion that what was done by the County Court Judge was at most but error in procedure, and as such was not the subject of either prohibition or injunction: *Ex parte Story* (1852), 8 Exch. 195; *Ackerley v. Parkinson* (1815), 3 M. & S. 411.

And that the proper course for the defendant to have taken was by notice of motion in the County Court addressed to and served upon Winton and Hall calling upon them to shew cause why the motion before the County Court Judge should not be set aside or be made returnable before the Master in Chambers, and upon this motion collusion in the first notice of motion could have been tried and disposed of, and our determination of this question is not to prejudice such a course being now taken.

Such course being taken, and no collusion being shewn in the first proceedings, the learned Judge of the County Court will no doubt make the proceedings before him returnable before the Master in Chambers, and we ought not to presume that he will not do his duty in this regard.

If this course had been taken, and it was in my opinion the proper course, the proceedings taken by way of prohibition would have been doubtless unnecessary, and it ought not to have been taken, the other course being open and certainly not to the absolute prohibition of Hall proceeding with his suit.

No judicial knowledge of the first notice of motion was brought to the Judge of the County Court till the second notice of motion was returnable, and personal knowledge is of no effect in such a matter.

The appeal must therefore be allowed with costs and the order appealed from set aside, with costs both before Mr. Justice Ferguson and Mr. Justice MacMahon forthwith after taxation thereof.

FALCONBRIDGE, J., concurred.

STREET, J. :—

Judgment.

Street, J.

In my opinion it was proper that an order should be made in this matter prohibiting the Judge of the County Court under the circumstances appearing in the affidavits from proceeding to try the matters raised by the notice of motion given by the relator Hall.

It is quite plain that apart from the question raised before the County Judge as to the *bona fides* of the proceedings of Winton in the High Court, the trial of both motions should, in accordance with the 227th section of the Municipal Act, have taken place before the Master in Chambers, because the notice of motion given by Winton in pursuance of the fiat of the Master in Chambers was returnable before him at an earlier date than the notice of motion given by Hall in pursuance of the County Judge's fiat was returnable before the County Judge.

The County Judge in fact only decided that he had a right to try Hall's motion because he determined that Winton's motion was collusive and therefore a nullity, and that it must be treated as having no existence.

In my opinion this was an inquiry into which he had no jurisdiction to enter. He was sitting as a Judge of the County Court dealing with a proceeding pending in his own Court and had no jurisdiction to deal with proceedings pending in the High Court. There can be no doubt of the right of the High Court to determine the question of the *bona fides* of proceedings taken in the High Court, and of the County Court to determine the same question with regard to proceedings in the County Court; but to allow a cross concurrent jurisdiction between the Courts would establish an entirely new and most inconvenient practice for which there certainly is no necessity and I think no precedent.

It is to be remembered in reading the cases upon the subject that down to the passing of sub-sec. (46) of ch. 15 of 60 Vict., the proceedings in this class of cases were always filed and entitled in the High Court even where

Judgment. the County Judge was authorized to try the issues raised
Street, J. by the notice of motion: see *Regina ex rel. McLean v. Watson* (1864), 1 C. L. J. N. S. 71; *Regina ex rel. Patterson v. Vance* (1871), 5 P. R. 335. According to the authority of the last of these two cases the relator Hall might have applied in the High Court in Winton's matter alleging collusion and asking to have the proceedings taken off the files, and that, in my opinion, is the course he should have adopted.

In the view I take of the matter the proceedings in Winton's case, until set aside by an order of the High Court, should have been treated by the County Judge as being valid and binding upon him, and as standing under the statute in the way of his proceeding to try the issues raised by the notice of motion.

It was urged that prohibition should not have been granted because the County Judge has equal powers with the High Court to try controverted municipal election cases, and that prohibition would not go against him in these cases because it would not go against a Judge of the High Court.

I think the result of the amendment of the law to which I have above referred has been to give to County Courts concurrent jurisdiction with the High Court in these matters, and that a County Judge in trying one of them which has been styled in the County Court is simply trying a proceeding in his own Court. His jurisdiction, however, to try it is strictly limited by section 227 and when he exceeds the limits imposed upon him the proper remedy is prohibition: *Martin v. Mackonochie* (1879), 4 Q. B. D. 697, 735.

The decision of the English Court of Appeal *In re New Par Consols, Limited* (1898), 14 Times L. R. 287, 42 Solicitors' Journal 343, was referred to as an authority that prohibition would not lie here. In that case an order had been made, in certain winding-up proceedings pending in the County Court, by the Judge of the County Court, for the committal of an officer of the company. An order had been made for a prohibition upon the ground of certain alleged

irregularities in the exercise of the power to commit and this was appealed against. By the first section of the Winding-up Act in question, 53 & 54 Vict. ch. 63, the County Court in each county along with other Courts is clothed with jurisdiction to wind up companies, and by the 6th sub-section of the first section it is provided that "Every Court having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court." It was held that the County Court was placed by the Act upon the same footing as the High Court in winding-up cases, and could not for the purposes of the Act be held to be a Court of inferior jurisdiction.

Judgment.
Street, J.

The difference here is that the County Court has not absolute jurisdiction in every case of a controverted municipal election to go on and try it; the right to do so is confined to cases in which no motion in the same election matter is made returnable at an earlier date in the High Court. The absolute duty of the Judge before whom a subsequent motion comes is not to try it himself but to make it returnable before the Judge who is to try the earlier motion.

If the case before us were reversed and the earlier motion were returnable before the County Judge, and the later one before the Master in Chambers or a High Court Judge, an order by the Master in Chambers or the Judge of the High Court for the trial before himself of the later motion could be corrected by appeal before trial, but there is no remedy in the present case but prohibition, so far as I can see, which would prevent the County Judge from proceeding to try a case which the Act says is to be tried before some one else. The fact that after the trial there might be an appeal from the decision of the County Judge to a Judge of the High Court does not appear to be a bar to an order for prohibition: *Veley v. Burder* (1841), 12 A. & E. at pp. 313, 314; *White v. Steele* (1862), 12 C. B. N. S. 383, 410; and I think the argument in favour of interference before the expense of a trial, which, in my view, must be abortive, has

Judgment. been incurred, is very strong. The remarks of Cotton, L. J.,
Street, J. in *Martin v. Mackonochie* (1878), 4 Q. B. D. 697, at p. 735,
are very appropriate with regard to many of the questions
raised in this case ; he says, "It is in many cases difficult to
draw the line between that which is matter of appeal and
that which justifies the issuing of a prohibition. But the
general rule is clear that if the Court of limited jurisdiction
in dealing with a matter over which it has jurisdiction
has fallen into an error of practice or of the law which it
administers, this can only be set right by appeal and
affords no ground for prohibition. When, however, an
Act of Parliament has imposed restrictions, as to the cir-
cumstances under which a Court of limited jurisdiction is
to act in matters otherwise within its jurisdiction, then, if
the Court of limited jurisdiction disregards the restriction
so imposed and acts in violation of the statutory restric-
tions, the party aggrieved has a remedy by prohibition,
even although the Court of limited jurisdiction may have
put a construction on the Act and there is an appeal from
its decision."

The order as drawn up here, however, goes too far in
prohibiting the County Judge from further acting in the
matter ; he should only have been prohibited from pro-
ceeding to try the matter and should have been left at
liberty to amend the proceedings before him by making
the motion returnable before the Master in Chambers.
With this correction, in my opinion, the order for prohibi-
tion should stand, but as it went too far and an appeal
was rendered necessary there should be no costs.*

A. H. F. L.

*On May 11th, 1898, motion was made on behalf of the defendant
before the Court of Appeal for leave to appeal to that Court, and leave
was granted accordingly on May 13th, 1898. Subsequently all parties
consented to the motion issued on the fiat of the County Court Judge
being adjourned before the Master in Chambers and the two motions
were afterwards tried together before that Officer.

[DIVISIONAL COURT.]

REGINA V. EDWARDS.

*Criminal Law—Indictment for Rape—Conviction of Common Assault—
Time within which Complaint Laid—Code, sec. 841.*

A prisoner indicted for rape may be found guilty of common assault notwithstanding the complaint or information is not laid within six months under section 841 of the Criminal Code.

CROWN CASE RESERVED.

Statement.

The prisoner, Frederick Edwards, was tried for rape at the Court of Oyer and Terminer for the county of York on January 19th, 1898, before ROSE, J., and a jury.

The act was charged as having been committed in the month of February, 1897, and the information was laid on November 11th, 1897.

The jury acquitted the prisoner of rape but found him guilty of common assault.

The case, the substance of which is set out in the judgment of FERGUSON, J., was argued on May 2nd, 1898, before a Divisional Court composed of FERGUSON, ROBERTSON and MEREDITH, JJ.

Faulds, for the prisoner. The prisoner was acquitted of the offence charged and must go free. He cannot be convicted of common assault as that was punishable on summary conviction and the complaint or information was not laid within six months of the offence: The Code, sections 840 and 841. Otherwise section 841, could be evaded by charging a more serious offence and obtaining a conviction for a lesser. I refer to *Queen v. West* [1898], 1 Q. B. 174.

J. R. Cartwright, Q.C., Deputy Attorney-General, for the Crown. This offence was not punishable on summary conviction, as it was not taken up or proceeded with in that way. There was no obligation to proceed summarily,

Argument. the prosecution could be by indictment: The Code, sec. 265. Summary trial depends upon the consent of both parties: section 864. Section 841 applies to cases where the magistrate has the absolute right to deal with the charge—here he should abstain: section 864, sub-section 2. Assault is included in the charge of rape and the conviction is proper and should be sustained: section 713.

Faulds, in reply.

May 6th, 1898. FERGUSON, J.:—

The indictment was for rape. The act was charged as having been committed in the month of February, 1897. The information was laid on the 11th day of November, 1897. The indictment was found on the 12th day of January, 1898. The jury acquitted the prisoner on the charge of rape, but found him guilty of a common assault. It was objected that there could be no conviction for common assault, as the complaint was not made or the information laid within six months from the time when the matter of complaint or information arose, the provisions of section 841 of the Criminal Code being invoked. The question is whether or not this section 841 applies to the case.

This section is contained in part LVIII. of the Code. Section 840 in the same part of the Code says, amongst other things: "Subject to any special provisions otherwise enacted with respect to such offence, act or matter, this part shall apply to every case in which any person commits, or is suspected of having committed, any offence over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment."

Section 841, amongst other things, enacts: "In the case of any offence punishable on summary conviction if no time is specially limited for making any complaint, or laying any information in the Act or law relating to the

particular case, the complaint shall be made, or the information shall be laid within six months from the time when the matter of complaint or information arose." Judgment.
Ferguson, J.

Under the provisions of section 864 whenever any person unlawfully assaults or beats any other person, any justice may summarily hear and determine the charge, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto. Or if such justice is of opinion that the assault or battery complained of is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same.

By section 265. Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labour.

This section 841 was originally section 5 of 52 Vict. ch. 45 (D.), an Act to amend the Summary Convictions Act, and it seems plain to me that its provisions apply only to cases arising and in which proceedings are had under the provisions regarding summary convictions.

The indictment being for rape (and in the form found in Archbold's Criminal Pleading and Evidence) and it being assumed that the information or complaint was one charging the same offence, there can, as I think, be no pretence that the offence charged was an offence punishable on summary conviction or one that could be properly tried under the provisions of the Summary Convictions Act or the analagous provisions now contained in the Code; and besides these provisions were not invoked or proceedings taken or sought to be taken under them.

The case seems to me the ordinary case of an indictment for rape in which on the trial the jury, under the provi-

Judgment. sions of section 713 found the defendant not guilty of the rape charged but found him guilty of the lesser offence included in the indictment and proved: and I am of the opinion that section 841 has no application whatever to the case.

ROBERTSON, J.:—

I concur in the judgment of my brother Ferguson just delivered.

MEREDITH, J.:—

The codification of the criminal laws and the practice in criminal cases in Canada has given cause or excuse for the argument of this case.

If the matter stood as before the Code, there could hardly be a doubt about it.

The section relied upon was section 11 of the Summary Convictions Act, [R. S. C. ch. 178] as amended by 52 Vict. ch. 45, sec. 5 (D.)—a provision similar to that contained in the Imperial Act, and one which has been in force here and in England for a good many years.

Its purpose and effect were to limit the time within which proceedings under the Summary Convictions Act might be taken, and had no relation whatever to proceedings in respect of indictable offences.

The Summary Convictions Act has now become part LVIII. of the Criminal Code, 1892. The amendment of section 11 merely extended the time limit generally from three to six months; and that section as so amended, is now section 841, in part LVIII. of the Code, with the words "in the case of any offence punishable on summary conviction" added, and the exception as to part of the county of Saguenay omitted.

But these changes did not alter the purpose or the effect of the section. They cannot be considered to have changed the well-known law, that in respect of the offence of which the prisoner was convicted there was no limit to

the time within which the prosecution must be commenced, Judgment.
except as to proceedings under the Summary Convictions Meredith, J.
Act.

The purpose was not to absolve from crime, but was to limit the time within which the accused might be tried and punished, deprived of the right of trial by jury.

The wording of section 841 might have been made plainer, as the section of the Imperial Act is ; but to those familiar with the practice in criminal cases before the Code, that could hardly have raised a doubt ; and to those who were not, and had doubt, the next following section of the Code ought to have removed it, for it is just as general in its words, and yet it is obvious that the words "every complaint or information" mean a complaint or information under the Summary Convictions Act : and the same words in the two sections must have the same meaning, there is no reason whatever for giving them one meaning in the one section and another, and very different, meaning in the other.

It was not extraordinary that Parliament, in conferring summary power to convict in minor criminal matters, should provide a limitation of time within which such exceptional proceedings must be taken ; and the less so in a case like this, where the punishment provided for on summary conviction differs from that provided for on conviction in the ordinary way upon indictment and trial by jury.

And again there might be a prosecution for the offence in question without any information or complaint at all, for instance, by indictment without any preliminary proceeding in the usual manner ; and so the section could not, even if its effect were that contended for, in the prisoner's behalf, bar a trial and punishment for the crime.

On the broad ground, that the time limit invoked applies only to proceedings for the purpose of summary conviction, I am of opinion that the ruling at the trial, upon the one question reserved, was, in effect, right, and should be affirmed.

G. A. B.

BAKER

V.

THE TRUSTS AND GUARANTEE CO., ET AL.

Bond—Maintenance—Penalty—Right to Sue for Support.

The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to and is not satisfied by payment of the amount of the penalty, and the obligee has the right to sue for her support as it accrues from time to time.

Statement. THIS was an action on a bond for maintenance.

One Edward Baker died intestate in the year 1864 seized of real property in the county of Stormont, leaving five children, one son, James E. Baker, and four daughters, Charlotte Baker (the plaintiff), Mary Ann Raymond, Louise Sheets and Margaret Baker.

James E. Baker purchased his sisters' shares and in payment for the shares of Charlotte and Margaret gave them a bond in these words :

KNOW ALL MEN BY THESE PRESENTS :—

That, I James E. Baker of the township of Cornwall, in the county of Stormont, yeoman, am held and firmly bound unto Margaret Baker of the same place spinster, and Charlotte Baker of the same place, spinster, in the penal sum of eight hundred dollars of lawful money of Canada, to be paid to the said Margaret Baker and Charlotte Baker, four hundred dollars to each or in the same proportion to their and each of their certain attorney, executors, administrators and assigns, for which payment well and truly to be made, I bind myself my heirs executors and administrators forever firmly by these presents.

Sealed with my seal and dated this twentieth day of April, one thousand eight hundred and sixty-four.

Whereas the said Margaret Baker and Charlotte Baker have conveyed unto the said James E. Baker their two undivided fifth parts of lot number thirty-eight, in the

first concession of the township of Cornwall, in the county of Stormont, and also their two undivided fifth parts of lot letter "A," in the first concession of the township of Osnabruck, in the county of Stormont, in consideration of [sic] the said James E. Baker his heirs executors administrators or assigns do [sic] and shall well truly [sic] faithfully maintain support board lodge clothe [sic] provide with medical attendance and medicine when sick and furnish with all necessaries and comforts such as they have been accustomed to the said Margaret Baker and Charlotte Baker [sic] each of them during her life or until she is married and also do and shall treat them and either of them during their or her natural life in such a kind and affectionate manner as a brother ought to treat his sisters, they the said Margaret Baker and Charlotte Baker doing and performing such work as they have been accustomed to do and are able to perform and may be reasonably required to perform by the said James E. Baker and whereas it has been agreed that the maintenance and support of the said Margaret Baker and Charlotte Baker in the manner above mentioned shall be a charge or lien on the lands above mentioned. Statement.

Now the condition of the above written bond or obligation is such that if the said James E. Baker his heirs executors administrators or assigns do and shall well truly and faithfully support and maintain the said Margaret Baker and Charlotte Baker in the manner above mentioned then this obligation to be void otherwise to remain in full force and virtue.

This bond was registered in the registry office for the county in which the lands were situate.

James E. Baker duly maintained his two sisters, neither of whom had married, until the date of the death of Margaret, and maintained Charlotte up to the time of his own death which took place on June 17th, 1897.

The defendants the company took out letters of administration to his estate and sold all his personal estate on November 27th, 1897.

Statement. The plaintiff not having received any maintenance since that date brought this action on February 9th, 1898, against the company and two mortgagees of the land subsequent to the registration of the bond, for her maintenance and to have a lien on the lands declared for the same and a sale if necessary.

The principal defence set up was that the \$400 mentioned in the bond was to be paid if the said James E. Baker did not support and maintain his sister and was not a penalty but in the nature of liquidated damages, and was the total amount she was entitled to, and the first mortgagee expressed a willingness to pay that sum in full of her claim.

The action was tried at Cornwall on May 9th, 1898, before STREET, J., without a jury.

R. Smith and George H. Pettit, for the plaintiff, cited *Lowe v. Peers* (1768), 4 Burr. 2228; *Hurst v. Hurst* (1849), 4 Ex. 571; *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112; *French v. Macale* (1842), 2 Dr. & W. 269.

James Leitch, Q.C., for the defendant, referred to *Wallis v. Smith* (1882), 21 Ch. D., at p. 258; *Kemble v. Farren* (1829), 6 Bing. 141; *Reynolds v. Bridge* (1856), 6 E. & B. 528.

May 14th, 1898. STREET, J.:—

This action was tried before me at Cornwall on 9th May, 1898, without a jury. The only question raised was as to whether the plaintiff was limited to the amount of the penalty in her bond for past and future maintenance and I am of opinion that she is not. She has the right to sue for her support as it accrues to her from time to time, and by virtue of the registration of the bond, which recites the agreement of James E. Baker, deceased, and gives her a lien upon the land in question for the amount of her

support, she has a right to claim this lien against the defendants, who are assignees of Baker.

Judgment.

Street, J

See *Lowe v. Peers* (1768), 4 Burr. 2228; *Winter v. Trimmer* (1763), 1 Wm. Bl. 395; *Harrison v. Wright* (1811), 13 East 343.

G. A. B.

SCOTTISH ONTARIO AND MANITOBA LAND CO.

v.

CITY OF TORONTO.

DEFOE V. CITY OF TORONTO.

Municipal Corporations—Waterworks—Supply of Water—Statutory Obligation—Breach of Contract.

In actions by consumers of water against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevators according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevators :—

Held, that there was no right of action in the plaintiffs by reason of any statutory obligation on the part of the defendants.

That, on the evidence, there was no contract between the plaintiffs and the defendants by which the latter were bound to supply the former with water free from sand.

The relation was rather that of licensor and licensee than one founded upon contract.

THESE were actions brought against the corporation of the city of Toronto to recover damages for not providing a proper supply of pure water for the plaintiffs' elevators, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevators. The judgments upon a preliminary question of law raised in the first action are reported in 24 A. R. 208, where, and in the present judgment, the facts are stated.

Statement. The actions were tried before ROSE, J., without a jury, at Toronto, on the 22nd March, 1898.

Ritchie, Q.C., and H. M. Mowat, for the plaintiffs in the first action.

Walter Read, for the plaintiff in the second action.

Robinson, Q.C., and Fullerton, Q.C., for the defendants.

May 26, 1898. ROSE, J.:—

In the first action it was held by the Court of Appeal, in 24 A. R. 208, that the plaintiff's action as set out in the statement of claim was for breach of contract, and for that reason the defendant was not permitted to plead the statutory defences.

The pleadings in the second action, I think, are substantially the same as those in the first. They were so treated by the defendant, and for that reason the statutory defences were not pleaded.

Mr. Read urged that paragraph 6 was founded upon a tort. I do not think so; I think it, read with the prior paragraphs, is merely a statement of the damage arising from the breach of contract. If I had come to a different conclusion, I should have permitted the defendant to plead the statutory defences, as it is manifest that they would have been pleaded had it not been for the decision in the first case.

I have not, therefore, to consider any claim founded upon tort or negligence in any form save for neglect to perform the contract, if any contract has been shewn. Nor do I think that I have to consider any claim founded upon what has been called "a parliamentary contract," *i.e.*, a statutory obligation on the part of the city to give those who have a right to demand a supply of water, a pure and wholesome article.

In *Attorney-General for Canada v. City of Toronto* (1893), 23 S. C. R. at pp. 519 and 520, the learned Chief Justice of Canada pointed out what the duty imposed upon the city was. Referring to the provision of the Municipal Act embodied in sec. 480, sub-sec. 3, of R. S. O. 1887 ch.

184, the learned Judge said : "That provision made it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body intrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. * * In other words, the city, like its predecessors in title the water works commissioners, is in a sense a trustee of the water works, not for the body of ratepayers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city."

Judgment.

Rose, J.

In Maxwell's Interpretation of Statutes, 3rd ed., p. 579, it is said : "The general principle was formerly considered of wider application ; for it was deemed that whenever a statutory duty was created, any person who could shew that he had sustained an injury from the non-performance of it, had a right of action for damages against the person on whom the duty was imposed ;" referring to *Couch v. Steel* (1854), 3 E. & B. 402. The learned author proceeds : "But this proposition cannot now be regarded as law. Whether any such right of action arises by implication must depend on the purview of the Act ;" citing *Atkinson v. Newcastle Water Works Co.* (1877), 2 Ex. D. 441, per Lord Cairns, Cockburn, C. J., and Brett, L. J. I extract the following paragraph from the judgment of Lord Cairns (p. 445) : "That this creates a statutory duty no one can dispute, but the question is whether the creation of that duty gives a right of action for damages to an individual who, like the plaintiff, can aver that he had a house situated within the company's limits and near to one of their fire-plugs, that a fire broke out, that the pipes connected with the plug were not charged at the pressure required by the section, and that in consequence his house was burnt down. Now, *a priori*, it certainly appears a start-

Judgment.**Ross, J.**

ling thing to say that a company undertaking to supply a town like Newcastle with water, would not only be willing to be put under this parliamentary duty to supply gratuitously for the purpose of extinguishing fire an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with Parliament to subject themselves to the liability to actions by any number of householders who might happen to have their houses burned down in consequence; and it is, *a priori*, equally improbable that Parliament would think it a necessary or reasonable bargain to make."

In the case before me, I think it would be equally unreasonable to suggest that it was intended to impose upon the commissioners under the former Act, or upon the municipality under the present legislation, a contractual obligation towards each taker of water of such a nature that for the non-supply of water, either in quantity or quality, such as might be deemed necessary for the purpose for which it was asked and which the taker intended to use it for, with the knowledge of the corporation, an action for damages would lie as for breach of contract. I think, therefore, that no right of action here is shewn in the plaintiffs, or either of them, by reason of any statutory obligation on the part of the defendant. I am assuming, for such opinion, that there is a statutory obligation on the part of the defendant to supply to each taker pure and wholesome water. I refer also to *Pictou v. Municipality of Geldert*, [1893] A. C. 524; *Cowley v. Newmarket Local Board*, [1892] A. C. at p. 354; *Regina v. Hall*, [1891] 1 Q. B. 747. *Finlay v. Miscampbell* (1890), 20 O. R. 29, may also be referred to.

I have then to see whether there is any evidence of any contract made between the parties. The contract set out is (referring to the pleading in the first action) "that the defendant for its own profit undertook, in consideration of the periodic payment to it by the plaintiff of certain sums of money, which payments were made, to

furnish the plaintiff with pure and wholesome water for the purpose of supplying power to the plaintiff's hydraulic elevator situate in its building on Toronto street in the city of Toronto, known as York Chambers." There was no written contract proven other than such as might be implied from an application made on the 19th April, 1883, signed not by the plaintiff company or any officer of the company but by the plumber McGuire, which is in the words following: "Toronto Water Works. Engineer's Office. Date April 19, 1883. No. Toronto, S. E. Cor. Court Street. Size of service 4-inch. To where taken. To street line. Remarks. For hoist. Charged \$19.50. Price of 2-inch pipe. Will take up 2-inch pipe there now. I require the above service laid as soon as possible. Manitoba Land Co. W. J. McGuire & Co."

Judgment.

Rose, J.

A similar application was made by the plaintiff Defoe, who asked for a supply for his factory. The contract alleged by him is similar to that alleged by the plaintiff company.

I have carefully read the Act authorizing the city to purchase, construct, have, and manage water works through commissioners (35 Vict. ch. 79, O.), and also the Waterworks Act, ch. 235, R. S. O., in as far as such Act may be considered to have affected the provisions of the special Act. As to the effect of the general Act, I refer to the observations of the learned Chief Justice in the case already referred to, in 23 S. C. R. at p. 519. There are some differences between the provisions of the two Acts, but such changes as have been made, if the special Act is to be considered as varied, are in favour of the defendant. Speaking generally—for I do not refer more particularly to the statute, because it is already fully discussed in the case to which I have referred—the powers are, as I have said, to enable the corporation to purchase, construct, and have waterworks. The object was, no doubt, to obtain a sufficient quantity of pure and wholesome water for the use of the inhabitants. The recital in the Act shews that there had been a difficulty in obtaining

Judgment. water of the quantity and quality required. Power is given to expropriate lands, and generally such powers as would enable the corporation to construct the works. Also power to raise the necessary moneys required not only from those who took but also from those who did not take the water. Prohibitions were enacted against any one taking water except with the consent of the commissioners, and protection was given to the commissioners and to their officers by secs. 21, 28, and 35. But I find nowhere in the Act, and certainly not in the general Waterworks Act, anything which would imply that the supply of water by the corporation to any individual was on the basis of a contract between the parties by which the corporation undertook to supply water in any particular quantity or of any particular quality. It would seem to be against the reason of the thing. The powers given were for the benefit of the public generally, and the needs and requirements of different individuals would vary. Most would require water for domestic purposes; some, for manufacturing purposes; and some, for scientific purposes. The inhabitants as a whole would require water for municipal purposes, such as putting out fires, laying the dust upon the streets, etc. Was it intended to enable or compel the corporation to enter into a contract with each taker according to his particular need or requirement? If a contract was made, then there was contractual obligation to furnish the taker with water fit for the purpose for which he might reasonably require it. And if, without any fault on the part of the city, there was a breach of such contract, the liability for damages would exist. So that, if, by reason of the supply having failed, a householder suffered damage, as, for instance, in winter, by the bursting of pipes, or a manufacturer, by the destruction of machinery, or in any other way that loss might come to any individual taker, then an action would of course lie for breach of contract, and damages almost without limit might be recovered from the corporation in actions almost

without number. The reason of the thing, as I have said, is against any such conclusion.

Judgment.

Rose, J.

I have found no case which suggests that the relation existing between an undertaker of water and the consumer is one of contract. In the case much referred to at bar upon the argument before me, the observations by the learned law Lords are against any such view. I refer to *Milnes v. Mayor, etc., of Huddersfield* (1886), 11 App. Cas. 511, and especially p. 523, where the Earl of Selborne said: "It is true this is a case of statutory obligation, not properly of contract;" and p. 530, where Lord Blackburn said: "It was, not very strongly, argued that the undertakers were in the position of persons selling water to the inhabitants of the district, and therefore that they were under an obligation to supply water fit to be used, in lead supply pipes, that being the ordinary mode in which water is used. But I think that the duty imposed on the corporation does not extend so far."

Clause 21 of the special Act (35 Vict. ch. 79, O.) lends some colour to the argument that the defendant would, but for such provision, be liable for damages caused by the breaking of any service pipe or attachment or for any shutting off of the water to repair mains or to tap pipes. Clause 26 of R. S. O. ch. 235 (the Municipal Waterworks Act) differs somewhat in language from the clause to which I have referred; but I cannot think that this protection, introduced *ex abundanti cautela*, and perhaps unnecessarily, establishes an obligation or is any evidence of an obligation, which I think did not exist.

On the whole, therefore, I am of the opinion that there is no evidence of any contract between the city and the plaintiffs, or either of them, by which the city was bound to supply the plaintiffs with water free from sand, the complaint here being that there was so much sand in the water as to injure the elevators, or indeed any contract to supply water in any quantity or of any quality. The relation between the parties seems to be rather that of licensor and licensee than one founded upon

Judgment.

Rose, J.

contract. Whether, if the action had been founded on negligence or a wrongful act caused by the servants of the corporation, the plaintiffs might have a good cause of action it is not necessary for me to consider or to decide. In the *Milnes* case the learned Judges carefully confined themselves (to use the language of Lord Bramwell) to seeing whether the plaintiff could succeed on the "*allegata et probata*," and declined to consider any question of negligence or anything outside of the strict issue brought before them. See *per* Lord Selborne, at p. 526; Lord Blackburn, at p. 532; Lord Bramwell, at p. 533.

I do not, therefore, go on to consider whether on the evidence before me I ought to find that the sand that was conveyed through the pipes to the elevators of the plaintiffs was there by the negligence or wrongful act of either the city or its workmen, servants, or agents.

The actions must, I think, be dismissed, and with costs.

Since writing the above, I have seen the full text of the judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of *Johnston v. Consumers' Gas Co.*, delivered on the 1st April last, and I make the following extracts as in point on the question of the liability of the defendant to an action at the suit of any individual consumer: "It cannot of course be disputed that the gas company is under an imperative obligation to create and maintain the several funds specified in the Act of 1887 in accordance with the directions of the enactment. Nor is it open to doubt that the machinery of the Act was designed for the benefit of all the company's consumers. At the same time it is to be observed that no pecuniary penalty is imposed for default nor is a right of action expressly and in terms given to persons aggrieved. Now, it is perfectly true, as was observed by Lord Tenterden, that if a statutory 'obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.' (*Doe dem. Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. at p. 859.) But it is equally true that the ques-

tion whether an individual who is one of a class for whose benefit such an obligation is imposed can enforce performance by an action at law must depend to use Lord Cairns' words 'on the purview of the Legislature in the particular statute and the language which they have there employed.' (*Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441.) It is especially so, as His Lordship observes, when the Act in question is not an Act of public and general policy but is rather in the nature of a private legislative bargain with a body of undertakers incorporated for purposes which Parliament considers of public or general utility. We know the history of this legislation. It is difficult to suppose that the gas company would wittingly have consented to place themselves at the mercy of every customer who might fancy he was paying more than the company was entitled to charge."

Judgment.
Rose, J.

E. B. B.

BROCK ET AL. V. BENNESS.

Limitation of Actions—Infant Heir-at-Law—Entry—Evidence of Lease—Estoppel—Adverse Title—Overholding Lessees—Tenants in Common.

In an action of ejectment, it appeared that the father of the defendant died intestate in 1849, the owner of the fee and in possession of the lands in question. He had been twice married, but none of the children of his first marriage had been heard of since 1853. His widow continued in possession after his death with her children; she married again in 1852, and her husband lived with her upon the land until her death, intestate, in 1871. At this time her husband and the youngest daughter of her first marriage, the defendant, were the only members of the family upon the land. Soon after her death, her eldest son made a lease of the land to his stepfather and his sister, the defendant, for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which was executed by the lessees, the lessor was described as the eldest son and heir-at-law of his father, the original owner. This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption, until 1892, when the stepfather died intestate, leaving a son, one of the plaintiffs, surviving him, and since that time the defendant had been in possession, also without acknowledgment or interruption, until this action was brought in 1897, by the surviving brother and sister of the defendant and her half-brother.

The lessor had died in 1878; it was said that he left one son, who, when very young, in 1880, was taken by his aunt, one of the plaintiffs, to the house upon the land, where he stayed one night; and the aunt said that she told her sister, the defendant, that he was the heir to the property:—

Held, that, even if the boy were the true owner, this was not an entry upon the land, as owner, sufficient to stop the running of the statute.

2. The defendant and her stepfather, being in possession without any title, and accepting a lease from the eldest son of the second marriage, as the heir-at-law, were estopped from setting up the adverse title of the real heir-at-law, the eldest son of the first marriage, as against the lessor or persons claiming under him.
3. The plaintiffs' claim to possession under a conveyance from the alleged heir-at-law of the lessor could not be allowed, because there was no evidence that he was the heir-at-law, and because his title, if he had any, had been barred by the possession of the defendant and her stepfather since 1876, when the lease expired.
4. The title acquired by the defendant and her stepfather by length of possession was acquired by them as tenants in common, and not as joint tenants, and therefore, upon the death of the latter, his undivided half descended to his son.

Ward v. Ward (1871), L. R. 6 Ch. 789, distinguished.

Statement.

ACTION by Isaac Brock, Catharine Tuttle, and Richard Henry McNeal, to recover from Anne Jane Benness possession of certain lands in the city of London.

The writ of summons was issued on the 29th November, 1897. The action was tried before STREET, J., at London,

on the 18th May, 1898. The facts and the points raised **Statement.**
at the trial are set forth in the judgment.

T. H. Luscombe, for the plaintiffs.

Talbot Macbeth, for the defendant.

May 26, 1898. STREET, J. :—

The facts, as I find them upon the evidence and the admissions made at the trial, are as follows :—

Charles Brock, the owner in fee simple of the lands in question, died at London, Ontario, in possession, in 1849, intestate. He had been twice married. By his first wife he had two sons and a daughter; the sons appear to have been last heard of about the year 1853, when news was brought of them by some people who had just arrived from Ireland, and who said that these sons had enlisted and were not likely to trouble the widow who survived Charles Brock, and who was then living upon the property. The daughter of the first wife does not appear to have been heard of at all.

By his second wife, Ann, who survived him, Charles Brock had four children, who also survived him. They were Arthur Brock, Isaac Brock, Catharine Tuttle, and Ann Jane Benness.

In 1852 Ann Brock, the widow of Charles Brock, was married to Daniel McNeal, by whom she had two children, viz., Richard Henry McNeal and Charles McNeal, both of whom survived her. She died in the year 1871; her son Charles McNeal died in 1885 intestate and unmarried; Daniel McNeal, her second husband, died in the year 1892 intestate, leaving the said Richard Henry McNeal, his only child and heir-at-law, surviving him.

After the death of Charles Brock, his widow Ann continued in possession with her children; her second husband, Daniel McNeal, came to live there with them when he married her. The children gradually moved away, and when she died, her husband, Daniel McNeal, and her

Judgment.
Street, J.

youngest daughter, Anne Jane Benness, then Anne Jane Strong, were the only members of the family who still lived there. Soon after Ann McNeal's death, her eldest son, Arthur Brock, returned to London from Memphis, Tennessee, where he was living, and made a lease of the property in question to his step-father, Daniel McNeal, and his own sister, Anne Jane Strong, for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which is produced, and is executed by the lessees, the lessor is described as "eldest son and heir-at-law of the late Charles Brock." This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption, until 1892, when Daniel McNeal died, as above stated, and since that time Anne Jane Benness (formerly Strong), the survivor of the original lessees, has been in possession, also without acknowledgment or interruption, until this action was brought in November, 1897, to recover possession from her.

Arthur Brock died in 1878, intestate, at Memphis, Tennessee, and he is said to have left one son named William Joseph Brock, his only child and heir-at-law, who, after his father's death, when very young, was taken by his aunt, Mrs. Tuttle, to Detroit, and was brought up there by her under the name of William Joseph Tuttle. Mrs. Tuttle says that in the year 1880 she took this boy with her to London and stayed with him for one night with Anne Jane Benness and Daniel McNeal in the house upon the property. She further says that while there she told Mrs. Benness that he was Arthur's child and was heir to the property when he should be twenty-one years of age. There was no evidence that this child was the child of Arthur Brock. Mrs. Tuttle went to Memphis six months after her brother Arthur's death, and there received from a person unknown to her, but who she learned was her brother's mother-in-law, the child in question. The child's mother was then dead. The person from whom Mrs.

Tuttle received the child is still living, but was not produced at the trial, and there was absolutely no evidence to connect the child in question with Arthur Brock. Even, however, if his identity had been established, I should find against the claim that his visit to the lands in question with Mrs. Tuttle, in 1880, was an entry upon the land as owner sufficient to stop the running of the statute. I should treat the matter as a mere friendly visit by Mrs. Tuttle to her sister, having no significance at all upon the question of title.

Judgment.
Street, J.

Charles Brock having died intestate in 1849, owner in fee in possession, leaving sons by his first wife, the eldest of those sons became entitled as his heir-at-law, but has long since been barred by the statute.

Anne Jane Benness and Daniel McNeal, however, being in possession without any title, accepted a lease for five years, in November, 1871, from Arthur Brock, the eldest son of the second marriage, as the heir-at-law, and are estopped from setting up the adverse title of the real heir-at-law, the eldest son by the first wife, as against the lessor or persons claiming under him. The plaintiffs, as one of their claims to the possession of the land, set up a conveyance from William Joseph Tuttle, the alleged heir-at-law of Arthur Brock. This claim cannot be allowed for two reasons:—first, because there is no evidence that he was the heir of Arthur Brock; and second, because, if he were, his title has been barred by the possession of Anne Jane Benness and Daniel McNeal since the 1st November, 1876, when their five year lease expired.

The alternative claim of the plaintiffs is to three undivided fourth parts of an undivided half of the land, under a conveyance dated the 23rd September, 1897, from Richard Henry McNeal, who is one of the plaintiffs, to his two co-plaintiffs, Catharine Tuttle and Isaac Brock, and to the defendant Anne Jane Benness, and himself. Richard Henry McNeal, who makes this conveyance, claims to have been entitled to an undivided half of the land in question as the only child and heir-at-law of his father,

Judgment. Daniel McNeal, deceased, who at the time of his death, in 1892, had been in possession jointly with the defendant Anne Jane Benness, since 1871, under the circumstances above mentioned. This alternative claim of the plaintiffs gives rise to a somewhat novel and difficult question. The plaintiffs claim under the assumption that the title acquired by the defendant, Anne Jane Benness, and the deceased Daniel McNeal, by length of possession, was acquired by them as tenants in common, and that, therefore, upon the death of the latter, his undivided half of the land descended to his heir-at-law, the plaintiff Richard Henry McNeal, from whom, by virtue of the conveyance above mentioned, three-quarters of this undivided half now belong to the three plaintiffs.

On the other hand, the defendant, Anne Jane Benness, contends that the statutory title acquired by her and Daniel McNeal was a joint tenancy, and that the entirety now is vested in her by survivorship.

In my opinion, the contention of the defendant cannot be sustained. I think she and Daniel McNeal were tenants in common and not joint tenants. Their possession began with the lease from Arthur Brock in November, 1871, under which they were tenants in common for the term created by it. That is the effect of the statute then in force, and now embodied in R. S. O. ch. 119, sec. 11. Holding over after the expiration of their term, they must be taken to have done so without any alteration in their tenure as between themselves, and they finally acquired the fee by the extinguishment of the rights of the true owner under the Real Property Limitations Act. Nothing occurred from beginning to end to alter the nature of their tenure, which was gradually converted by the mere lapse of time from a tenancy in common for years to a tenancy in common in fee.

The argument of the defendant in favour of her contention was rested upon the authority of the case of *Ward v. Ward*, L. R. 6 Ch. 789, decided by Lord Chancellor Hatherley in 1871, but I think that case is distinguish-

able. In that case Robert Ward and Bryan E. Ward were tenants of Rebecca Ward, who had a life estate before her death in 1841. Robert Ward and Bryan E. Ward each became entitled in possession to one undivided third of the property, the remaining third being vested in another person. They, however, continued in possession of the whole property until May, 1862, when Bryan E. Ward died, and the question was whether the statutory title which he and Robert Ward had acquired to the undivided third of which they had been wrongfully in possession since the death of Rebecca Ward, was acquired by them as joint tenants or as tenants in common. It was held by Malins, V.-C., and upon appeal by the Lord Chancellor, that they had acquired as joint tenants and not as tenants in common.

Judgment.
Street, J.

The position was this:—at the time of the death of Rebecca Ward they were lessees of the whole, just as Daniel McNeal and Anne Jane Benness were in the present case when their lease expired. The essential difference is, however, that under the English law the two lessees held as joint tenants, while under the Canadian law the two lessees held as tenants in common. When Rebecca Ward died, the two lessees each became lawfully entitled to the possession of an undivided third, and they were tenants in common and not joint tenants of these two undivided thirds by reason of the manner in which they were acquired; they remained in possession of the other undivided one-third without any right, but at the same time without anything to alter the nature of their former holding, as between themselves, which was as joint tenants. The extinguishment, by the operation of the statute, of the title of the true owner, therefore, naturally resulted in their continuing to be joint tenants of the fee, just as in the case before me the result was the acquiring of the fee by the overholding tenants as tenants in common.

I do not see that the passage from Coke upon Littleton cited in *Ward v. Ward* really affects either that case or

Judgment. the present, because there was no disseisin in either case.
Street, J. The distinction between the effect of a disseisin, where the title of the disseisors has no foundation in right, and a case such as the present, of the unlawful holding over after the expiration of a lawful title, seems very plain. In the former case there is no previously existing title in the disseisors by which the common law effect of a title acquired by them as the result of a disseisin is modified: in the latter there is nothing to modify or alter the presumption of the continuance of their existing tenure as between the lessees.

The result is that the defendant, upon the death of Daniel McNeal, was entitled to an undivided half of the property, and the plaintiff Richard Henry McNeal, as the heir-at-law of Daniel McNeal, to the other half. This state of things has been modified by a conveyance from him to his two co-plaintiffs, the defendant, Anne Jane Benness, and himself, under R. S. O. ch. 119, sec. 37, of all his interest in the property, the alleged consideration being the carrying out of a family compromise or arrangement, and one dollar.

The defendant will therefore be declared entitled to an undivided half of the land and to an undivided quarter of the other half, and each of the plaintiffs will be declared entitled to an undivided eighth of the property. These proportions do not include the land conveyed to the defendant by Richard Henry McNeal in January, 1889, which is her absolute property.

The costs of both parties should be taxed, including the costs of the examinations for discovery and *de bene esse*. The plaintiffs should be charged with five-eighths of the defendant's costs, and the defendant with three-eighths of the plaintiffs' costs, and the balance only should be paid by the one party to the other.

E. B. B.

DORSEY ET AL. V. DORSEY.

Husband and Wife—Separate Estate of Wife—Husband's Interest in—Renunciation—Rights of Administrator of Wife's Estate—Evidence of Renunciation—Construction of Document.

A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R. S. O. ch. 127, sec. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself.

And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest.

The administrator of the wife's estate has a status to set up the husband's renunciation in answer to a claim made by him to a share in the estate.

The husband, before marriage, signed a writing as follows: "This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects:—"

Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage, and was sufficient to protect her estate from any claim of his, after the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896.

MOTION by the plaintiffs for judgment on the pleadings and admissions of the defendant on her examination for discovery. Statement.

The action was brought by Henry Dorsey and J. J. Moore against May Annetta Dorsey, in her personal capacity, and as administratrix of the estate of Ann Eliza Dorsey, and also as representing the next of kin of the latter under an order of Court, for a declaration that the plaintiff Henry Dorsey was entitled to a one-third interest in the estate of Ann Eliza Dorsey, his wife, and for administration of her estate. The intestate died on the 28th September, 1896, leaving both land and personalty. She was married to the plaintiff Henry Dorsey on the 5th December, 1894. The defendant was the daughter of the deceased by a former marriage. Shortly before the marriage of the deceased to Henry Dorsey, he signed and delivered to her the following memorandum: "Toronto, December 3rd, 1894. Articles of agreement. This is to

Statement. certify that I, Henry Dorsey, through marriage to Ann Eliza Thomas, will not assert any right or claim on the property of the said Ann Eliza Thomas, either real estate, cash in bank, household or personal effects."

The plaintiff J. J. Moore was the pledgee of his co-plaintiff's interest in the estate.

The defence was that the plaintiff Henry Dorsey had deprived himself of his interest by executing the document above set out.

The plaintiffs replied that the defendant and the other next of kin of the intestate had no rights as against the plaintiffs under the agreement and could not enforce it, not being parties nor privy to it. They also set up that, upon the true construction of the document, it did not operate to deprive the plaintiff Henry Dorsey of his share of the estate of his wife at her death.

The motion was heard by BOYD, C., in Court, on the 25th May, 1898.

W. H. Irving, for the plaintiffs.

C. A. Ghent, for the defendant.

May 27, 1898. BOYD, C.:—

If the wife, having separate personal property, makes no disposition, the husband succeeds as next of kin, not in consequence of the marital right: *per* Lord Thurlow, C., in *Fettiplace v. Gorges* (1789), 1 Ves. Jr. at p. 48. But Lord Loughborough, C., is of a contrary opinion in *Watt v. Watt* (1796), 3 Ves. Jr. at p. 247, where he says: "The description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of the wife *jure mariti*: her personal property vests in him by the marriage. * * The husband is not of kin to the wife; nor she to him." And to the same effect Lord Eldon in *Garrick v. Camden* (1807), 14 Ves. 372, and Sir W. Grant, M. R., in *Bailey v. Wright* (1811), 18 Ves. 49, affirmed (1818), 1 Swanst. 39, and *Molony v. Kennedy* (1839), 10

Sim. 254. The husband may, however, renounce all marital right and interest in the property of his wife ; and if this is done, as here, by ante-nuptial agreement, upon faith of which the marriage takes place, he cannot after the death of the wife be allowed to recede from this position. The language of Lord Thurlow in 1 Ves. Jr. is referred to in *Re Lambert* (1888), 39 Ch. D. at p. 633, but rather with a view of explaining than affirming it. Stirling, J., there regards it as a gloss upon the old statutory expression, "the next and most lawful friend of the wife," found in 31 Edw. III. But, however or in whatever quality the husband may take, it is because he is the husband that he so takes, and I think it is strictly correct to regard him as beneficially entitled because of his marital relationship and right. But, if he renounces this marital right before marriage and in order to it, can the law replace him in a benefit out of which he has contracted himself? Surely not.

Judgment.
Boyd, C.

The same consideration applies to the land owned by the wife before marriage, which was also covered by the ante-nuptial writing signed by the intended husband. But for that renunciation, he would be entitled under the Act R. S. O. ch. 127, sec. 5.

The claim now made by the husband to take one-third of the estate should have been advanced earlier, upon the application for administration. His right was then, if it is so now, to take the statutory share of the wife's estate, and his right was then to administer that estate exclusively of all other persons: *Humphrey v. Bullen* (1737), 1 Atk. 458: yet he renounced his right in favour of one of the next of kin—the deceased's daughter. But, on the merits, I think that the grant was rightly made to the defendant as next of kin—because the grant of administration should follow the interest, and the husband had given up all interest as a condition of the marriage. It is said in *Rea v. Bettsworth* (1739), 2 Str. 1111, that where the husband has departed from all interest in the wife's fortune, he shall not have administration ; and the reason is because then

Judgment. he has no interest in the estate, and administration follows interest: *Allen v. Humphreys* (1882), 8 P. D. 16.
Boyd, C.

The defendant, now clothed with powers of administration, has become the legal personal representative of the married woman, and has the same rights and liabilities in respect of the estate that would belong to the deceased: R. S. O. ch. 163, sec. 23. One of these rights is to insist that the surviving husband shall not break his bond and seek to share in the estate which he renounced before marriage. (See *Surman v. Wharton*, [1891] 1 Q. B. 491.)

There was no discussion about the form of the engagement signed by the plaintiff. It appears to me to be distinct in its terms, definite and comprehensive, and to be read according to its obvious meaning as an abandonment of any right or claim in the property which might accrue to the plaintiff Dorsey through marriage to Ann Thomas.

The Married Women's Act in force at the date of the marriage, 1894, protected the wife in the separate use of the property. This paper was intended to go further, and did in effect protect the estate of the wife from any claim of the husband after the separate use ceased by her death in 1896.

The action should be dismissed with costs.

E. B. B.

THE CANADA PERMANENT LOAN AND SAVINGS COMPANY

V.

THE TRADERS BANK.

Fixtures—Chattels—Mortgage of Realty—Conversion by Express Agreement—Subsequent Chattel Mortgage—Notice—Priority.

Chattels of the nature of plant or machinery not structurally affixed to the freehold, as well as those of a like nature afterwards placed on the mortgaged premises, may, by the express terms of a mortgage of the realty, become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance.

THIS was an action by mortgagees of real estate, whose Statement.
mortgage by its terms included certain chattels, against subsequent mortgagees for a declaration that the plaintiffs were entitled to the chattels and for an injunction to prevent the defendants from removing them.

The mortgagors were a manufacturing company, who had obtained from the plaintiffs a loan on their factory, premises and machinery valuing them separately in their application for the loan.

The mortgage to the plaintiffs granted and mortgaged the lands "Together with all the plant and machinery now upon or hereafter placed upon said lands, all which plant and machinery are to be considered as fixtures for the purposes of this mortgage," and provided "That none of the machinery now upon or hereafter placed upon the said land will be removed during the currency of this mortgage," and after the covenant to insure provided that "The foregoing covenant to insure shall apply to machinery as well as to buildings, and the company (plaintiffs) shall have a first lien for the mortgage debt on all insurance on the buildings and machinery, whether effected under the said covenant or not."

The defendants were assignees of a subsequent mortgage, which conveyed the plant and machinery by the same words as were used in the plaintiffs' mortgage, and contained a covenant that the mortgagors had a good

Statement. title, etc., "subject to the said mortgage to the Canada Permanent Loan and Savings Company," and after the assignment to the defendants they also became mortgagees under a chattel mortgage covering "all the machinery and plant on the said premises," and setting out in detail most of the machines, etc.

The defendants claimed the machinery and plant by virtue of their chattel mortgage, and threatened to proceed to remove and sell them when the plaintiffs brought this action, which was tried at the non-jury Sittings held at Toronto on April 12th, 1898, before BOYD, C.

S. H. Blake, Q.C., and C. J. Leonard, for the plaintiffs, cited *Bacon v. Rice Lewis* (1897), 33 C. L. J. 680; *Haggert v. The Town of Brampton* (1897), 28 S. C. R. 174; *Keefer v. Merrill* (1881), 6 A. R. 121; *Ex p. Astbury*; *Ex p. Lloyd's Banking Co.*; *In re Richards* (1869), L. R. 4 Ch. 630, at p. 635; *Rogers v. The Ontario Bank* (1891), 21 O. R. 416; *Dickson v. Hunter* (1881), 29 Gr. 73; *Robinson v. Cook* (1884), 6 O. R. 590; *Bain v. Brand* (1876), 1 App. Cas. 762, at p. 779; *Joseph Hall Manf. Co. v. Hazlitt* (1885), 11 A. R. 749; *The Sheffield and South Yorkshire Permanent Benefit Building Society v. Harrison* (1884), 15 Q. B. D. 358; *Climie v. Wood* (1868), L. R. 3 Ex. 257.

James Parkes, for the defendants, cited *Fraser v. Pen-dlebury* (1861), 31 L. J. C. P. 1; *Ex p. Morgan, In re Simpson* (1875), 2 Ch. D. 72; *Gooderham v. Denholm* (1860), 18 U. C. R. 203; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Keefer v. Merrill* (1881), 6 A. R. 121; *Bacon v. Rice Lewis* (1897), 33 C. L. J. 680.

April 12th, 1898. BOYD, C.:—(at the close of the argument)

I have some general knowledge of this branch of law, as I had to consider it carefully in the case of *Haggert v. Brampton* (1897), 28 S. C. R., p. 174.

The present case, I think, is distinguished from all the

cases of pure fixtures by reason of the agreement contained in the first mortgage. This mortgage, it is true, is upon the land, but it also covers the plant and machinery.

Judgment
Boyd, C.

"Plant" of course is a wider term than "machinery." The word "plant" I suppose would strictly include things which some people would say are not machines, such as the lathe and the planer. It says, "plant and machinery now upon or hereafter placed upon the said land (that is attached not in any way other than by their own weight), all of which plant and machinery are to be considered as fixtures for the purposes of this mortgage." Then the matter is referred to again in this way: "That none of the machinery now upon or hereafter placed upon the said land will be removed during the currency of this mortgage."

An injunction, I suppose, would lie to restrain the removal.

Then after the covenant to insure appears this provision: "The foregoing covenant to insure shall apply to machinery as well as to buildings, and the company shall have a first lien," etc.

The material point here is, that there is an agreement that "all the plant or machinery now upon or hereafter placed upon the said lands, are to be considered as fixtures for the purposes of this mortgage."

I think that this clause is peculiar, not arising in any of the cases which have been cited and the effect of it is to constructively convert all chattels of that character of the nature of plant or machinery put into these premises—to give to them the character of realty or fixtures for the purposes of security—that being so, it is to my mind the strongest evidence of intention that could possibly be afforded as between mortgagor and mortgagee, that the things not structurally affixed should be constructively affixed by the terms of this instrument, which brings the case within the ruling of *Holland v. Hodgson* (1872), L. R. 7 C. P. 328, where it is said there are the two classes of fixtures; first, those that are actually annexed, and as

Judgment.

Boyd, C.

to those there is no peradventure that even the lightest annexation is enough to carry them to the mortgage; and, secondly, as to those which are not structurally affixed the onus is upon the mortgagee to shew they are fixtures, or come within the doctrine of constructive annexation.

The mortgagees to my mind have completely discharged that onus by shewing this primary agreement between themselves and the mortgagors, that all the plant and machinery hereafter placed upon the land, whether attached or not, are to be considered as fixtures for the purposes of this mortgage.

Then, soon after the making of the plaintiffs' mortgage Mr. Pender takes another mortgage. I see he is the secretary of this manufacturing company, which mortgage is transferred to the Traders Bank, made expressly subject to the plaintiffs' mortgage and registered, so that by presumption of law there is the notice of the prior mortgage. Then the bank takes the chattel security and the same presumption of notice continues.

It has not been disproved, and I think the presumption is plain that they had notice by reason of their dealings with his property. They had notice of the prior mortgaging of these chattels—so-called chattels—that are of the character of plant and machinery, making them constructively annexed to the freehold.

To my mind that disposes of the case. The Traders Bank are not in any better position than the Steel Sink Company* would be. The Steel Sink Company could not remove them, and the bank holding with notice of that agreement are equally bound by it.

G. A. B.

* The mortgagors.

MANNING ET AL. V. ROBINSON ET AL.

Will—Construction of—Gift to Charities—Validity—Legacies—Deduction of Legacy Duty—"Protestant Charitable Institutions."

In an action for construction of a will :—

Held, that the gift of the residue of a mixed fund to the executors to be distributed "among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they * * may deem proper," was a valid gift, having regard especially to sec. 8 of 55 Vict. ch. 20, R. S. O. ch. 112, the provision in force at the time of the testator's death in 1895.

Held, also, that the legacy duty was to be deducted from the legacies, and the executors had no discretion to pay such duty out of the residue.

Kennedy v. Protestant Orphan's Home (1894), 25 O.R. 235, followed.

Held, also, that the House of Refuge for the poor of a county was not within the terms of the residuary gift. The word "Protestant," as used in the will, was referable as well to the objects of the charitable institutions as to their government; and "Protestant charitable institutions" were such charitable institutions as were managed and controlled exclusively by Protestants and were designed for the bestowal of charity upon Protestants alone.

THIS was an action brought by the executors of the will Statement. of James Robinson, deceased, against James Robinson the younger, one of the legatees under the will and one of the next of kin of the testator, and the Attorney-General for Ontario, representing the charitable institutions interested under the residuary clause of the will, to obtain a declaration as to the true construction of the will upon the following points :—

(a) The validity of the residuary gift.

(b) Whether the legacy duty payable to the Crown should be deducted from the amounts payable to the legatees, or paid out of the residue.

(c) Whether the plaintiffs, the executors, could exercise a discretion to pay the legacies in full and pay the legacy duty out of the residue.

(d) Whether the House of Refuge for the Poor of the County of Peel was within the terms of the residuary gift, and whether the plaintiffs could legally exercise a discretion in favour of it under the terms of the will.

The testator died on the 29th September, 1895. The

Statement. will was dated on the 20th September, 1894. There were five codicils to it, the last being dated on the 30th January, 1895. The codicils did not affect the clauses of the will which were in question in the action, and which are set out in the judgment.

The estate of the testator consisted of pure personalty, \$10,128.08, impure personalty, \$14,852.09, and real estate, \$480; altogether, \$25,460.17.

After paying the specific legacies and the debts and funeral and testamentary expenses out of the general estate as out of a mixed fund, the plaintiffs had in hand a residue of \$3,632.11 for distribution under the residuary clause.

The case was heard upon motion for judgment on the pleadings before ARMOUR, C.J., in Court, on the 28th April, 1898.

Justin, for the plaintiffs.

Hollis, for the defendant Robinson.

J. R. Cartwright, Q.C., for the defendant the Attorney-General.

June 2, 1898. ARMOUR, C.J.:—

I am of the opinion that the residuary gift under the will, which is as follows: "As to the rest, residue, and remainder of my estate not hereinbefore disposed of, I direct that the same shall be distributed by my said executors and trustees among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they, my said executors and trustees, or the majority of them, may deem proper." is a valid gift.

The testator died on the 29th day of September, 1895, and by his said will he gave, devised, and bequeathed unto his executors and trustees thereafter named, and the survivors and survivor of them, all his real and personal estate, wheresoever and whatsoever, excepting such of his

personal estate as was thereafter specifically bequeathed, Judgment.
in trust to sell his real estate as soon as conveniently Armour, C.J.
might be after his decease, to the best advantage, either by
public auction or private sale and either for cash or upon
terms of credit as to his executors and trustees might seem
best, and when so sold to convey the same by a proper
deed of conveyance to the purchaser or purchasers thereof;
and also in trust to sell and convert into money such of
his personal estate as was not thereafter specifically
bequeathed, and to stand possessed of the proceeds of his
said real and personal estate in trust to pay his just debts,
funeral and testamentary expenses, and the legacies and
bequests therein set forth, the legacies and bequests there-
in given for charitable purposes to be paid out of that
portion of his estate which should be composed of pure
personalty, if sufficient.

At the time of the testator's death the law in force was
the provision contained in the 8th section of 55 Vict. ch.
20, now R. S. O. ch. 112, sec. 8: "Money charged or
secured on land or other personal estate arising from or
connected with land, shall not be deemed to be subject to
the provisions of the statutes known as the Statutes of
Mortmain or of Charitable Uses as respects the will of
a person dying after the passing of this Act on or after the
14th day of April, 1892, or as respects any other grant or
gift made after the said date."

This provision does not appear in any of the Imperial
Acts, not even in the Act 54 & 55 Vict. ch. 73, on which our
Act 55 Vict. ch. 20 is based.

This provision removes any objection to the validity of
the residuary gift under the said will.

The legacy duty payable to the government is properly
deducted from the legatees, and should not be paid out of
the residue, and the plaintiffs have no discretion to pay
such duty out of the residue: *Kennedy v. Protestant
Orphans' Home* (1894), 25 O. R. 235.

The House of Refuge for the Poor of the County of Peel
is not within the terms of said residuary gift, and the

Judgment. plaintiffs can legally exercise no discretion in favour of Armour, C.J. such House of Refuge under the terms of said will.

The remaining question is, what are Protestant charitable institutions within the meaning of the residuary gift under the said will.

The word "Protestant," as here used, is, in my opinion, referable as well to the objects of the charitable institutions as to their government.

And I call "Protestant charitable institutions" such charitable institutions as are managed and controlled exclusively by Protestants and are designed for the bestowal of charity upon Protestants alone.

The costs as between solicitor and client of all parties will be out of the estate.

E. B. B.

O'NEIL V. HOBBS.

*Division Courts—Tort—Payment into Court—Continuance of Action—
—Right to Money in Court—Prohibition.*

In a Division Court action for a tort, money paid into Court by a defendant in alleged satisfaction of the plaintiff's claim, at once becomes the plaintiff's, but if he proceeds with the action it must under Rule 170, remain in Court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom.

Where, therefore, after payment into Court by a defendant of a sum of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favour, an order made by the Division Court Judge directing the sum so paid in to be paid out to the defendant, was set aside, and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant.

THIS was a motion for an order prohibiting the clerk of Statement.
the Eighth Division Court in the county of Middlesex from paying out to the defendant Hobbs the sum of \$10.32, paid by him into Court; or from taking any further proceedings on the judgment entered for the said defendant in the said Court with costs; and for an order directing the Judge of the said Court and the said clerk to enter judgment for the plaintiff against the said defendant for \$8, and the costs of the action to be taxed by the said clerk, on the ground that the payment into Court by the said defendant Hobbs in satisfaction of the plaintiff's claim and costs was an admission of the plaintiff's cause of action, and the only question left to be tried as against him was the question of damages, and such question, having been left to the jury, was answered in favour of the plaintiff.

The action was commenced on the 15th November, 1897, in the said Division Court by an ordinary summons issued out of the said Court.

The statement of the plaintiff's claim was that the defendant Hobbs, who was the servant of the defendant Bessie Thompson, while driving the horse of the said Bessie Thompson over a bridge on one of the roads in the township of London drove it so recklessly and unskillfully as to force a carriage and pair of horses of

Statement. the plaintiff on to the side of the bridge whereby the said carriage and horses were injured ; and the plaintiff claimed \$60.

The defendants filed a notice disputing the plaintiff's claim against them ; and on the same day the defendant Hobbs paid into Court the said sum of \$10.32, and filed with the clerk the following notice :—

“ Take notice that the defendant John Hobbs brings into Court the sum of \$10.32 ; and says that the said sum is sufficient to satisfy the plaintiff's claim in full including the costs thus far incurred in this action for the wrongs complained of and damages sustained.”

It appeared of this amount \$6 was for damages, and \$4.32 for costs.

The plaintiff was notified by the clerk of the Court of the payment of the above amount into Court ; when he notified the clerk that he intended to proceed for the remainder of his claim ; and that he required the issues to be tried and the damages assessed by a jury.

On the 12th April, 1898, the action came on for trial before the Division Court Judge and a jury.

The learned Judge submitted certain questions to the jury, which, with the answers thereto, were as follows :—

1. “ Was there negligence on the part of the driver Hobbs ? ” Answer. “ No.”

2. “ If there was negligence on his part did it cause the accident ? ” Answer. “ No.”

3. “ Was the driver Hobbs acting in the employment of the defendant Thompson when the accident occurred ? ” Answer. “ No.”

4 “ If you find damages, say how much over \$6, if any.” Answer. “ \$2 more.”

After the jury had brought in their findings the plaintiff's counsel applied to have the moneys paid into Court paid out to him on the ground that the payment into Court by the defendant Hobbs, in satisfaction, was an admission of liability ; and for judgment for the plaintiff against the said defendant Hobbs, on the ground that the

only issue left to the jury, as against the said defendant Hobbs, was the question of damages, and that the jury had awarded \$2 more than was paid into Court. Statement.

The learned Judge refused the application and directed judgment to be entered for the defendants with costs to be paid by the plaintiff; and he directed the \$6 and costs paid into Court, to be returned to the defendant Hobbs.

An application was then made by the plaintiff for a new trial, which was refused with costs.

The motion for the order of prohibition and for the order to enter the judgment for the plaintiff was then made.

On May 14th, 1898, the motion was argued.

Talbot McBeth, for the motion.

Tooth, contra.

May 20, 1898. ROSE, J. :—

This was a motion brought on before me at the sittings of the Weekly Court in the city of London, on the 14th May, for an order prohibiting further proceedings upon the judgment herein, and directing judgment to be entered for the plaintiff for \$8 and costs.

The facts appeared upon the proceedings filed.

I do not think that the practice of the High Court applies to govern the question in dispute. Section 312 of the Division Courts Act, R. S. O. 1897 ch. 60, gives power to the County Judges to adopt and apply the general principles of practice in the High Court "in any case not expressly provided for by this Act or by existing rules, or by rules made under this Act."

It seems to me that the decision of this case rests upon the construction of sections 128-133. Sections 128, 129 and 130, are by their terms confined to actions of debt or contract, and provide for tender and payment into Court; but I do not think that the provisions of sections 131, 132 and 133, are so limited. They, it seems to me, apply to all

Judgment.

Rose, J.

cases and permit the payment of money into court in actions of tort as well as in actions of debt or contract. These sections were considered in *Re McGregor v. Norton* (1889), 13 P. R. 223, where, at page 225, the Court said that where after payment into Court the plaintiff gave the written notice required by the statute of his intention to proceed in the action, there was in effect a new suit or action for the remainder of the claim.

It will be observed that these sections provide for the payment into Court not only of the amount which the defendant admits but also of the plaintiff's costs up to such time of payment; and in case the plaintiff gives the written notice of his intention to proceed for the remainder, it is provided that "the action shall proceed as if brought originally for such remainder only;" and it is further provided, by section 133, that if the plaintiff recovers no further sum than the amount paid into Court, he shall be liable to the defendant for all costs, charges and expenses incurred by him in the action after such payment.

In no case, according to the provisions of these sections, is the plaintiff liable to pay the defendant any costs prior and up to the payment into Court. It seems to me, therefore, that when the money is paid into Court under the provisions of these sections it becomes at once the plaintiff's and, subject to the rule to which I shall refer, there is no jurisdiction given to the Judge to prevent the plaintiff having such money paid out to him. By Rule 170, found in Bicknell & Seager's Division Courts Act, vol. 2, p. 95, it is provided that, in the event of the plaintiff giving the written notice referred to, the money so paid in shall not be paid out until after judgment, and that any costs which shall have been awarded to the defendant shall be deducted therefrom and paid to the defendant. Assuming that the amount paid into Court was \$20, and that the amount of the costs subsequent to the payment was \$5, it seems to me that the Judge would be exceeding his jurisdiction, in other words, acting without jurisdiction if he ordered payment to the defendant of the \$15. The money

would remain in Court under the provisions of Rule 170 until after judgment and until after the costs of the defendant were deducted, and the balance, the plaintiff would be entitled to by statutory right. In the present case, the sum of \$10.32 was paid into Court to satisfy the plaintiff's claim in full, including the costs up to the time of such payment. This sum was composed, as I understand it, of \$6 for damages and \$4.32 for costs. The answers of the jury to the questions submitted to them prevented the plaintiff recovering more, although the damages were assessed contingently at \$2 over and above the \$6 paid into Court. In my opinion, the plaintiff was entitled to the sum of \$10.32 by the provisions of the statute, and was entitled to take such money out of Court after the trial and after there had been deducted therefrom any costs awarded to the defendants subsequent to the payment into Court.

Judgment.

Rose, J.

I think, therefore, that the learned Judge in ordering the payment out to the defendant of the sum of \$10.32 was exceeding his jurisdiction, and that the plaintiff by virtue of the statute and the rules was entitled to demand from the clerk the payment of such sum less such costs subsequent to the payment into Court as may have been awarded by the Court to the defendant.

The motion was also for an order directing judgment to be entered for the plaintiff for the sum of \$8, being the \$6 paid into Court, and \$2 damages, on the ground that the payment into Court of the \$6 admitted the liability of the defendant to the plaintiff. That is not a matter, I think, with which I have to do. The learned Judge had jurisdiction in the cause, and whether he has properly or improperly decided as a matter of law that the payment into Court was not an admission of liability, it is not for me to say. This is not an appeal from his judgment, and I have no right to review his findings of law or of fact.

The order will go prohibiting the payment out to the defendant of the sum of \$10.32 beyond what may be necessary to pay the costs awarded to the defendant for

Judgment. costs incurred subsequent to the payment into Court, and
Rose, J. to such extent prohibiting further proceedings upon such
judgment for the defendant.

The plaintiff has asked for too much, and has failed in a substantial portion of his claim. The order will therefore go without costs.

G. F. H.

[DIVISIONAL COURT.]

DANIEL V. DANIEL ET AL.

Chattel Mortgage—Renewal Statement—Assignment between Making and Filing—R. S. O. ch. 148, sec. 18.

A chattel mortgage does not cease to be valid as against creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment.

Construction of sec. 18 of R. S. O. ch. 148.

THIS was an action brought by Christopher J. Daniel, Statement.
on behalf of himself and all other creditors of the defendants Henry Daniel, George E. Daniel, and John H. Daniel, to recover certain sums of money from these defendants, and to have it declared that a certain chattel mortgage made by these defendants and the defendant Frank B. Daniel to the defendant William Daniel, and assigned to the defendant Stockton, was null and void as against the plaintiff and such other creditors, on the ground that it was an unjust preference, and also on the ground that it was invalid under the Bills of Sale and Chattel Mortgage Act.

The action was tried before FALCONBRIDGE, J., without a jury, at Brantford, on the 16th November, 1897, and judgment was given on the 6th January, 1898, dismissing the action with costs as against the defendants William Daniel and Stockton.

The plaintiff appealed from this judgment upon several grounds, but the only one necessary to state for the purposes of this report was that the mortgage had ceased to be valid as against the plaintiff and other creditors of the mortgagors, because it had not been properly renewed in 1896 by the filing of a statement in the manner provided by the Bills of Sale and Chattel Mortgage Act, the fact being that the defendant William Daniel, the mortgagee, signed the statement and made the necessary affidavit on the 12th December, 1896, and assigned the mortgage later

Statement. on the same day to the defendant Stockton, while the statement and affidavit were not filed until the 14th December, 1896.

The chattel mortgage itself was dated the 14th December, 1894, and filed on the 19th of the same month; a renewal statement was regularly made and filed in December, 1895; and the renewal in 1896, now in question, was within the year allowed by statute.

The provision of the Act applicable to this question is to be found in sec. 18 of R. S. O. ch. 148:—

Subject to the provisions hereinafter contained as to mortgages to companies, every mortgage, or copy thereof, filed in pursuance of this Act, shall cease to be valid, as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee, his executors, administrators, or other assigns, in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof, is filed * * with an affidavit of the mortgagee * * or of the assignee * * that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose.

The appeal was heard by a Divisional Court composed of ROSE and MACMAHON, JJ., on the 7th April, 1898.

J. Bicknell and *A. Bicknell*, for the plaintiff.

Brewster, for the defendant William Daniel.

S. C. Smoke, for the defendant Stockton.

June 22, 1898. ROSE, J. (after disposing of some of the other questions involved in the appeal):—

I have had some considerable difficulty with the objection that the statement was filed after the assignment;

but, on the whole, I have come to the conclusion that such objection cannot obtain.

Judgment.

Rose, J.

The learned trial Judge found against the plaintiff's contention at the trial without giving at length his reasons for his conclusion on this point; but sec. 18, providing that a statement shall be filed shewing the interest of the mortgagee and the amount still due for principal and interest on the mortgage, although it does not, in terms, say anything about the making of such a statement, must have intended that some time should elapse between the making and the filing. In the ordinary course of business affairs it would be impracticable that the statement should be filed on the day that it was made; and, even if filed on the day on which it was made, it would not necessarily, under all circumstances, shew, at the moment of filing, the exact state of affairs.

To hold that the statement must, at the moment of filing, shew the exact state of affairs, would be to require the mortgagees to attend at the office where the statement is required to be filed, and then and there make the statement, verify it, and file it as of the moment of making it. Where the mortgagee, as in many cases, resides at a considerable distance from the county town, sometimes out of the Province, and sometimes out of the Dominion, it seems to me manifest that the thirty days mentioned in the section are named so as to give ample time, after making the statement and verifying it, to send it to the office for filing.

Assuming a mortgagee to reside in Montreal, and to make a statement and verify it, as required by the statute, and send it to his solicitor, say in Toronto, to be filed, and a payment to be made immediately after the statement had been forwarded to the agent for filing; in such a case the statement would be true when made, and as exhibited and verified by the affidavit; yet it would not be true as of the moment of filing. It would be absurd, it seems to me, to contend that the security would be invali-

Judgment. dated by reason of a change of the amount between the
Rose, J. moment of making and verifying and the moment of filing

Assume, again, the case of a mortgagee making a statement and verifying it on the last of the thirty days, and dying immediately after. Could not the executors file it on the following day? If they could, then such an illustration would cover the case in question. To hold that they could not, would be to make the requirements of this section a veritable trap for those holding such securities.

I may refer to the language of Jessel, M. R., in *Ex p. Popplewell* (1882), 21 Ch. D. at p. 79: "This is one of the many applications under the Bills of Sale Act of 1878, and if ever there was a case of splitting straws, it has been in some of the decisions under that Act and the prior Act of 1854. Of course the Act was intended to give reasonable information to those who deal with persons who have executed bills of sale, but it was not meant to be a mere trap for those who advance money on such securities. It is the duty of a Judge to construe the Act fairly; but, on the other hand, he ought not to adopt a literal construction when it would lead to an absurdity." I also refer to the language of the learned Chancellor and the citations made by him in *Martin v. Sampson* (1896), 24 A. R. at pp. 5 and 6.

If in this case the statement had been filed the day it was made, and the assignment had been executed a moment after the filing, those affected by the mortgage, and who had a right to require it to be renewed, would have had no more information than they had by what was done. Take the case of a mortgage made, and assigned within the five days given for registration. At the time of the registration the fact would not appear of the assignment, and the affidavit, while true at the date of making it, would not be true as of the date of filing. Here the statement was true when made; the affidavit was true when sworn to. The affidavit, by the statute, is to be read as part of the document. It purports to exhibit the condition of affairs on the 12th, not on the 14th, day of

December. It does, in truth and in fact, exhibit the interest of the mortgagee on that date and the state of the account. And I think that is all that can be called for.

Judgment.

Rose, J

I think I am giving full effect to the statute, and not opening a door for any mischief which was aimed at by the statute, in upholding the conclusion reached by my learned brother.

MACMAHON, J., concurred.

Appeal dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. LYON.

Criminal Law—Demanding Property with Menaces—Criminal Code, 1892, sec. 404—Intent to Steal—Evidence.

By sec. 404, Criminal Code, 1892, "Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it."

The defendant was convicted by a magistrate of an offence against this enactment.

The evidence was that the defendant went, as agent for others, to the complainant's abode to collect a debt from him; that the defendant threatened the complainant that if the latter did not pay the debt, he would have him arrested; that the defendant demanded certain goods, part of which had been sold to the complainant by the defendant's principals, and on account of which the debt accrued, but upon which they had no lien or charge; and the complainant, as he swore, being frightened by the threats and conduct of the defendant, acquiesced in the demand for the goods, part of which the defendant took away and delivered to his principals, who themselves took the remainder. The defendant swore that he demanded and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this:—

Held, MEREDITH, C.J., dissenting, that there was no evidence of intent to steal.

Conviction quashed.

THIS was a motion to make absolute a rule *nisi* to quash the conviction of the defendant by the police magistrate for the city of Toronto for that he, the defen-

Statement.

Statement. dant, did, "with menaces, demand, take, and carry away, with intent to steal, from one Leon Easton, one bicycle, one coffee mill, one set of scales, one scoop, a number of account books, one stove, and other articles, the property of the said Leon Easton, contrary to the form of the statute in such cases made and provided." The main ground of the motion was that the evidence disclosed no intent to steal, as required by the statute, sec. 404 of the Criminal Code, 1892, which is as follows:—

"Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it.

The motion was heard by MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 5th April, 1898.

W. R. P. Parker, for the defendant, cited *Rex v. Hall* (1828), 2 Russell on Crimes, 6th ed., p. 83; *Rex v. Williams* (1886), 7 C. & P. 354; *Regina v. Boden* (1844), 1 C. & K. 395; *Regina v. Hemmings* (1864), 4 F. & F. 50; *Regina v. Wade* (1869), 11 Cox C. C. 549; *Regina v. Johnson* (1857), 14 U. C. R. 569; *The State v. Hammond* (1881), 41 Am. R. 791.

J. R. Cartwright, Q.C., for the Crown, referred to *The Queen v. McGrath* (1869), L. R. 1 C. C. R. 205; *Regina v. Robertson* (1864), Leigh & C. 483.

June 29, 1898. MEREDITH, C.J.:—

The prisoner was convicted before the police magistrate for the city of Toronto of an offence against sec. 404 of the Criminal Code, 1892.

The prosecutor owed an account to a firm of Steel, Hayter, & Co., and the prisoner, who was a collecting agent, was employed by the firm to collect it, and it was when the prisoner went to the prosecutor's place of business to collect the account that the offence of which he has been convicted is alleged to have been committed.

There was a conflict of testimony as to what took place on that occasion, but the police magistrate, no doubt, accepted the statement of the prosecutor in preference to that of the prisoner. What took place was, according to the prosecutor's statement, as follows:—The prisoner requested payment of the account, and was informed by the prosecutor that he could not pay it then; the prisoner thereupon shut the door, and said three or four times that if the prosecutor opened it, he, the prisoner, would have him arrested on sight; the prisoner further said that if the prosecutor did not pay the account, he would have him arrested; the prisoner demanded the goods of the prosecutor, some of which had not been purchased from Steel, Hayter, & Co., and to none of which were they entitled. The prosecutor swore that, being frightened by the threats and conduct of the prisoner, he acquiesced in the demand made by him, and some of the goods were taken away by the prisoner. The prosecutor says nothing as to the goods being demanded as security for the account of Steel, Hayter, & Co.; and it may be that the police magistrate disbelieved the statement of the prisoner that they were given and received in that way, as he evidently disbelieved his other statements when they were contradicted by the prosecutor; and it may well have been found by the police magistrate that the prisoner knew that he had no right to have the prosecutor arrested, and that there was no cause for his being arrested, and that he knew that he had no right to take the goods, even as security for the debt, without the consent of the prosecutor.

Judgment.
Meredith,
C.J.

Such being the evidence in and the nature of the case, the sole question for consideration is, was there any evidence of an intent to steal the goods within the meaning of sec. 404; for, if there was, the conviction was right, and ought to be affirmed.

I am unable to agree in the view that if the goods were demanded as security for a real debt due by the prosecutor to the prisoner's employers, the inference that the intent of the prisoner in demanding them with menaces was to

Judgment. steal them could not be drawn, though, even if that be so,
Meredith, it does not, in my opinion, affect the case, because, as I
C.J. have pointed out, the statement that the goods were agreed to be given as security for the debt may have been, and probably was, disbelieved by the police magistrate.

In all the cases which have been referred to as supporting the proposition I have just mentioned, unless it be *Rex v. Williams* (1836), 7 C. & P. 354, the ground upon which the prosecution failed was that the accused had a legal right to the thing demanded, or demanded or sought to take it under some colour of right. In *Regina v. Johnson* (1857), 14 U. C. R. 569, the demand was of payment of money which was legally due to the accused by the person upon whom the demand was made.

Regina v. Hemmings (1864), 4 F. & F. 50, was a similar case.

In *Regina v. Boden* (1844), 1 C. & K. 395, though the accused had no legal right to take that which he sought to take by force from the person in whose possession it was, he was acquitted of assault with intent to rob because, as Baron Parke ruled, there was too much semblance of a right to claim the sovereigns attempted to be taken to justify proceeding with the case for the felony (p. 397).

Rex v. Williams (1836), 7 C. & P. 354, which was a case of false pretences, seems at first sight to support the contention of the prisoner's counsel. There the accused had obtained from the wife of the prosecutor a quantity of malt upon the pretence that his master had bought it from the husband, which was untrue; the intention of the accused was to obtain the malt to secure his master the means of paying himself a debt due to him by the prosecutor, of which the master was unable to obtain payment. The accused was acquitted by the jury, after a summing up by Mr. Justice Coleridge in which he told them that if they were satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it would be their duty to find him not guilty.

It will be observed that it was left to the jury to find what the intent was; they were not directed to acquit.

In the case in hand, the police magistrate, it is not unreasonable to assume, having directed his mind to the like consideration to which the attention of the jury was directed in the *Williams* case, has found that the intent of the prisoner was to steal the goods.

Referring to the *Williams* case, Chief Baron Pollock, in *The Queen v. Hamilton* (1845), 1 Cox C. C. at p. 247, says: "The defendant believed, however erroneously, that he had some sort of right to do as he did, and this was probably the ground on which the jury acquitted him."

The element of belief, however erroneous, of the prisoner in this case that he had some sort of right to do as he did, is wanting, for the reason I have already mentioned, and the *Williams* case is therefore no authority in his favour.

The application of *The Queen v. McGrath* (1869), L. R. 1 C. C. R. 205, cited by Mr. Cartwright, is open to question, because in that case there was no real debt, but a sham one, fraudulently set up in order to enable the accused to make his demand effective. But in *Regina v. Lovell* (1881), 8 Q. B. D. 185, which was decided on the authority of the former case, the person upon whom the demand was made really owed the accused for a service which he had performed for her, though he demanded a sum much in excess of what he was entitled to, and made the threats which he used in order to compel payment of this dishonest claim.

I do not see, assuming that the prisoner in this case knew that he had no right to obtain the goods in question from the prosecutor in the way in which he did obtain them, as found by the police magistrate, and that his threat of arrest was conceived for the purpose of enforcing his unfounded demand, how, morally, or in its legal aspect, his acts differ from those of the prisoner in the *Lovell* case.

It is unnecessary for me to say, and immaterial to consider, whether I should on the facts have arrived at the same conclusion as that to which the police magistrate

Judgment.
Meredith,
C.J.

Judgment.
Meredith,
C.J.

came as to the sufficiency of the evidence ; his judgment and not mine must govern. My only right to interfere depends upon there having been no evidence to warrant a finding against the prisoner, and I am not satisfied of that ; and the result, therefore, is that, in my opinion, the conviction should be affirmed.

I refer also to *Regina v. Walton* (1863), Leigh & C. 288 ; *Regina v. Gibbons* (1898), 18 C. L. T. Occ. N. 243.

ROSE, J.:—

We must take it for granted, I suppose, that the magistrate has found that the indebtedness of the complainant to Steel, Hayter, & Co., was only a simple contract debt, and that neither that firm nor the defendant had any lien or charge upon nor any right to take the goods of the complainant that were taken possession of either by the defendant or by the firm. As a matter of fact, it would appear from the evidence that the defendant took away only the bicycle and the keys of the complainant's premises, and that Steel, Hayter, & Co. took away the rest of the goods. It must also be assumed that the magistrate found that the complainant had not done any act which justified the defendant in threatening to have him arrested, and that the defendant had no honest belief that the complainant was liable to arrest. Further, that this threat was a menace which might reasonably affect the complainant, and did in fact so affect him as to take away from him the power to exercise his judgment, or, to use the words of Lord Ellenborough, C. J., in *The King v. Southerton* (1805), 6 East 126, 140, "the threat was of such a nature as was calculated to overcome a firm and prudent man." The words of the section being that "every-one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it," it would make no difference that the defendant demanded

the goods for his employers and not for himself, and it would be sufficient, of course, within the literal wording of the section, to prove a demand, although the demand did not result in acquiescence; but here the bicycle, at least, having been obtained by the defendant in consequence of the threat, one need not further pursue such question. The magistrate must also have found, in order to support the conviction, that this demand was made with intent to steal the goods; and, having regard to the definition of theft or stealing in sec. 305 of the Code, that the intent was to fraudulently and without colour of right take the goods or convert them to the use of either the defendant or his employers. The conviction is that the defendant did "with menaces, demand, take, and carry away, with intent to steal, from Leon Easton, one bicycle, one coffee mill, one set of scales, one scoop, a number of account books, one stove, and other articles, the property of the said Leon Easton, contrary to the form of the statute in such cases made and provided."

Judgment.
Rose, J.

As I have pointed out, the defendant personally did not take and carry away more than the bicycle; but, having regard to the wording of the statute, that possibly makes no difference, save that the conviction may not strictly be in accordance with the facts.

The question, then, is whether there is any evidence at all of intent to steal, that is, to fraudulently take or convert these goods. The complainant was indebted to Steel, Hayter, & Co. The amount of the indebtedness was apparently in dispute. The complainant said it was \$31.66; the defendant said that the account placed in his hands for collection was some \$88. It is not shewn that the defendant knew what the correct amount was, and so nothing can be made on the evidence of a demand for a larger amount. The defendant had the right to demand payment of the account, and he had a right to obtain payment or security. And if the defendant, without any threat, obtained the goods in question, of course he would not only not have done anything that was reprehensible,

Judgment.

Rose, J.

but he would have simply done his duty towards his employers.

The demanding of the goods must on the facts be taken to have been a demand by way of obtaining payment or security. In my opinion the evidence is not open to any other view. There would have been no fraud whatever in obtaining the goods for the purpose of paying or securing the debt, and, unless the threat of the criminal proceedings in itself was wrong, I do not see any wrong that the defendant did. In other words, it seems to me that there is an entire lack of evidence to shew any intent to steal, or, in other words, any intent to, fraudulently and without colour of right, take or convert the goods in question.

The intent was not primarily to obtain the goods, but to obtain money in payment of the debt, and the goods were only demanded to compel or enforce such payment. The intent in making the threat was not to defraud but to compel the debtor to do what it was his duty to do, *i.e.*, pay his creditor what he owed him. The means taken were reprehensible, but that did not change the intent.

I refer particularly to the cases of *Regina v. Boden* (1844), 1 C. & K. 395, and *Regina v. Hemmings* (1864), 4 F. & F. 50; and to secs. 202 and 203 of Russell on Crimes, 9th Am. ed., vol. 5, chapter 3.

In my opinion, the conviction cannot be sustained.

MACMAHON, J.:—

The motion is to quash a conviction made by the police magistrate for the city of Toronto, convicting the defendant of having, at the city of Toronto, by menaces and threats, taken and carried away, with intent to steal, from Leon Easton, one bicycle, one coffee mill, one set scales, one scoop, one stove, a number of account books, and other articles, the property of the said Leon Easton.

The evidence shews that the defendant is a collecting agent, and was intrusted by the firm of Steel, Hayter, & Co. with the collection of an account against the prosecutor,

amounting to \$89.46, of which \$31.66 was overdue, and that the defendant threatened that unless payment was made or security given on the goods in Easton's shop for the amount of the account, he would have Easton arrested; and Easton stated that, being frightened by the threats, he gave the defendant the bicycle and the keys of the shop, and the defendant took possession of and delivered the bicycle and the keys of Easton's shop to Steel, Hayter, & Co., and that firm afterwards removed from the shop the other property mentioned in the indictment, valued at about \$100.

Judgment.
MacMahon,
J.

Section 404 of the Code, under which the defendant was convicted, provides that: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it."

The defendant, having a valid claim for collection against Easton, was simply carrying out the instructions of his principals in demanding payment or insisting upon security being given; and if he made use of a threat to have Easton arrested merely to obtain security, that would not of itself bring him within sec. 404—there must exist, in addition thereto, the essential ingredient, "the intent to steal." And "stealing" is defined by sec. 305 to be "the act of fraudulently and without colour of right taking, or fraudulently *and* without colour of right converting to the use of any person, anything capable of being stolen." And, although the police magistrate has found the existence of such intent, the evidence is wholly opposed to such finding.

The defendant, on obtaining possession of the bicycle, immediately handed it over to Steel, Hayter, & Co. as part of the security he had obtained for their claim, together with the keys of the shop which he had procured from Easton. So that all the defendant did was done for the benefit of Steel, Hayter, & Co. and to obtain security for their claim. And the design being to obtain security

Judgment. for a debt due his employers, the procuring for that purpose possession of the bicycle even by means of a threat would not constitute theft; for the right of Steel, Hayter, & Co. to obtain payment or security for their debt admittedly existed, and what was done by the defendant was, therefore, with colour of right; while, as above defined, to constitute theft or stealing, colour of right must be absent. It would have been fraudulent and without colour of right had possession of the goods been obtained by means of a threat, if no debt existed: *The Queen v. McGrath* (1869), L. R. 1 C. C. R. 205. The evidence of any intent on the part of the defendant to fraudulently and without colour of right convert to the use of his employers the goods in question, was wanting.

MacMahon,
J.

In *Regina v. Johnson* (1857), 14 U. C. R. 569, where the prisoner, who had a claim against the prosecutor, put his hands in his pockets, saying he had a pair of pistols, and if the prosecutor did not give him the money he would blow his brains out, it was held that demanding money actually due with menaces is not a demand with intent to steal. And in *Rex v. Williams* (1836), 7 C. & P. 354, where the prisoner was indicted for obtaining two sacks of malt from one Mary, the wife of Peter Williams, it appeared that the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money, of which John Williams could not procure payment; and that the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in her husband's absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away; and that thereupon the prosecutor's wife delivered the two sacks of malt to the prisoner, who carried them to his master. It further appeared that the pretence was false, and that the prisoner knew it to be false at the time he used it. Coleridge, J., in charging the jury, said: "It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time

intended to defraud Peter Williams." See also *Regina v. Judgment. Boden* (1844), 1 C. & K. 395. .

MacMahon,
J.

In *The Queen v. McGrath* (1869), L. R. 1 C. C. R. 205, cited by Mr. Cartwright, the prisoner was an auctioneer at a mock auction, and knocked down some cloth to the wife of the prosecutor, for which she had not bid. The prisoner refused to allow her to leave the room until she paid for it; she paid \$26 for the cloth because she was afraid. She took the cloth away with her. There is a marked distinction between that case and the present. In *The Queen v. McGrath* there was no debt and therefore no valid claim for the sum demanded by the prisoner. The money was obtained by fraud and duress. In the present case there was an admitted valid claim, for which the creditors of the prosecutor had a right to demand payment or get security.

There must be judgment for the defendant quashing the conviction.

Rule absolute to quash conviction ;
MEREDITH, C.J., *dissenting.*

E. B. B.

[DIVISIONAL COURT.]

WARREN V. VAN NORMAN.

Way—Right of—Prescription—Termini—Slight Deviations—Interruptions—Appeal—Admission of New Evidence—Erection of Gate Across Way.

The decision of STREET, J., 29 O. R. 84, affirmed on appeal.

The plaintiff, having omitted to give formal proof of his title at the trial, was allowed to supply it upon the appeal.

Upon the plaintiff's assent, the judgment below was varied by awarding to the defendant leave to erect and maintain a gate across the end of the way in question.

Clendenan v. Blatchford (1888), 15 O. R. 285, followed.

Statement.

THE defendant appealed from the judgment of STREET, J. (*ante* p. 84), in favour of the plaintiff in an action for a declaration of his right of way over certain lands, etc.

In the former report there is an error on p. 85, line 7. "Uncontradicted" should read "contradicted."

The appeal was heard by a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on the 5th April, 1898.

Britton, Q.C., for the defendant.

J. A. Hutcheson, for the plaintiff.

June 29, 1898. ROSE, J. :—

I think that the judgment of our learned brother Street was quite right. In addition to the cases referred to in the judgment, I might refer to *De La Warr v. Miles* (1881), 17 Ch. D. 535, 592; *Washburn on Easements*, pp. 176-7; *Presland v. Bingham* (1888), 41 Ch. D. 268; *Knock v. Knock* (1897), 27 S. C. R. 664; *Ker v. Little*, now in appeal.*

The plaintiff at the trial omitted to put in formal proof of his title, which proof we allowed him to supply,

* Heard in the Court of Appeal and standing for judgment.

and he has now exhibited to the Court a paper title beginning with the year 1866. The prior title deeds are said to have been destroyed by fire.

Judgment.
Rose, J.

The plaintiff has filed an affidavit in which he states his willingness that the defendant should erect and maintain a gate across the south end of the right of way in question at the point where it joins the Sand Bay road, on condition that he, the defendant, be ordered to remove the obstruction placed by him to prevent the passage from such way into the Sand Bay road. The plaintiff, of course, would have the right to pass through the gate, opening the same for such purpose and closing it after passing through, so as to protect the defendant's property from trespasses.

The case of *Clendenan v. Blatchford* (1888), 15 O. R. 285, may be referred to as to the right of the defendant to maintain such a gate.

The defendant must remove the obstructions placed by him. The judgment will be varied as indicated, and will shew the plaintiff's assent to the erection and maintenance of the gate.

As the plaintiff has obtained some substantial benefit from this motion, we think that perhaps it would not be quite fair to direct the defendant to pay all the costs of making it. Each party will therefore bear his own costs of the motion.

MEREDITH, C. J., and MACMAHON, J., concurred.

E. B. B

[DIVISIONAL COURT.]

ALLEN V. ONTARIO AND RAINY RIVER R. W. CO. ET AL.

Company—Contract Made by Director—Authorization—Informality—Sale of Undertaking—Purchase Money—Equitable Charge Upon.

The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company:—

Held, that the plaintiff was entitled to recover from the company the value of his work.

Mahony v. East Holyford Mining Co. (1875), L. R. 7 H. L. 869, followed. *Wood v. Ontario and Quebec R. W. Co.* (1874), 24 C. P. 334, commented on.

The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into Court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the Court and being willing that the judgment debt should be paid out of the fund in Court; an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs and of the costs of the two directors out of such fund.

Statement. THIS was an action brought by F. B. Allen against the above named railway company and Thomas A. Gorham, J. O. P. Clavet, R. E. Mitchell, James McTaigue, D. F. Burk, and M. Dwyer, to recover \$1,204.62 from the company for work and labour; and for a declaration that a certain sum of \$7,500, in the hands of the defendant Gorham, was chargeable with the liabilities of the company; and for other relief.

The statement of claim alleged:

(1) That the plaintiff was the printer and publisher of the *Herald* newspaper in the town of Port Arthur.

(2) That the defendant company was a railway company, incorporated by an Act of the Ontario Legislature,

49 Vict. ch. 75, and that the other defendants were the provisional directors of the railway company from the time of its incorporation to the month of May, 1897, when they resigned. Statement

(3) That from the time of the incorporation down to May, 1897, the plaintiff did certain work and furnished certain material for the purpose of advertising and promoting the undertaking of the company, to the value of \$1,204.62.

(4) That on the 15th May, 1897, the individual defendants, as such provisional directors, entered into an agreement with William McKenzie and R. J. McKenzie, whereby these defendants were to hand over to the McKenzies all the assets and franchises of the company, representing that the company had no debts or liabilities, or, at least, undertaking to indemnify the McKenzies against any debts or liabilities, and the McKenzies were to pay to these defendants the sum of \$7,500 therefor; that such agreement had been carried out, and the sum of \$7,500 had been paid over to the defendant Gorham, and was in his hands.

(5) That this sum of \$7,500 was the only asset available for payment of the plaintiff's claim, but the defendants sought to divide it among themselves without regard to the claims of the plaintiff and other creditors of the company.

(8) That in a certain pending action brought by D. F. Burk against the defendants Mitchell, Clavet, McTague, and Gorham, and one Conmee, an interim injunction had been granted restraining the defendants therein from dealing with such sum of \$7,500.

(9) The plaintiff submitted that he was entitled to judgment against the railway company for \$1,204.62 and to a declaration that the sum of \$7,500 was first chargeable with all the liabilities of the company existing on the 15th May, 1897, and to an order directing that such sum should be paid into Court and be paid out in satisfaction of all proper claims against the company.

Statement.

The action was tried before BOYD, C., without a jury, at Port Arthur. The evidence is summarized in the judgment of ROSE, J.

Judgment was given by the Chancellor on the 15th January, 1898, in favour of the plaintiff for \$600 and costs, to be paid out of the sum of \$2,500 ordered to be paid into Court in *Burk v. Mitchell* (which action was also tried before the Chancellor), being part of the sum of \$7,500 in the pleadings mentioned, and directing that the costs of the defendants Burk and Dwyer (who did not oppose the plaintiff's claim) should also be paid out of such fund.

The defendant Gorham appealed from the Chancellor's judgment, upon the following grounds:—

(2) That there was no contract between the plaintiff and the defendant company or the defendant Gorham for the performance of the work and services alleged to have been done by him or for payment to him therefor.

(3) That the contracting of the debt alleged, for newspaper puffing, was *ultra vires* the company.

(4) That the Chancellor had no power to order payment of the amount awarded to the plaintiff out of the fund in Court in another action, which fund was the personal property of the defendants other than the company and Burk.

(5) That the Chancellor erred in importing his knowledge of the evidence in *Burk v. Mitchell* into this action.

(6) That the Chancellor erred in awarding to the defendants Burk and Dwyer their costs out of the fund, especially as they did not ask for it in their pleadings.

The appeal was heard by ROSE and MACMAHON, JJ., on the 6th April, 1898.

S. H. Blake, Q.C., and *H. M. Mowat*, for the appellant, referred to *Hepburn v. Patton* (1879), 26 Gr. 597; *Wood v. Ontario and Quebec R. W. Co.* (1874), 24 C. P. 334.

W. R. Riddell, for the plaintiff, relied on *Jones v. Miller* (1893), 24 O. R. 268.

D. L. McCarthy, for the defendants Burk and Dwyer. Statement

D. W. Saunders, for the defendant company.

The defendants Clavet, Mitchell, and McTaigue were not represented on the argument, not having been notified.

June 27, 1898. ROSE, J. :—

The case of *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, is thus summarized in the 3rd ed. of Brice on Ultra Vires, at p. 614: "In any case where a person holds himself out as an agent or official of a corporation, and the circumstances are such that in law the corporation could repudiate such person or take proceedings to restrain him, but has not done so, then his acts within his apparent authority will bind the corporation as regards persons ignorant of his true position, even though his assumption of authority is entirely unwarranted."

On the facts of this case as found by the learned Chancellor, I take it that we must hold that it was established that the defendant Burk was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, that he did this without any specific instructions from time to time at formal meetings of the board, and that everything was done in the most informal manner. I think the evidence fully justifies the finding that the members of the board were fully cognizant of what he did, and his manner of doing it, and that they vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company. In the notes of evidence, Burk is said to have stated in answer to counsel that everything was practically done by himself; that when he did anything for the company it was verbally reported to the directors, and no memorandum was made of it in the minutes, the communication being to the directors individually, not at any special meeting. He also stated that half of the business of

Judgment.

Rose, J.

the company was done on the street; that he used to run around and visit each one of the directors in their offices and tell them what was going on; he further stated that they knew from what he told them and from what they saw in the paper that the plaintiff was performing services for the company. I should have thought it reasonably clear that evidence of this class was quite sufficient to support the finding of the learned Chancellor that the plaintiff ought to recover against the company, the evidence establishing that the plaintiff was employed by Burk for and on behalf of the company to do the work for the value of which judgment has been given. But the case of *Wood v. Ontario and Quebec R. W. Co.* (1874), 24 C. P. 334, was much pressed upon us as being against this view, and as laying down the principle that in an action of this sort the plaintiff could not recover in the absence of any written or recorded evidence of the joint action of the directors. It seems to me that that decision would not have been given had the case of *Mahony v. East Holyford Mining Co.* then been decided by the House of Lords, the judgment in that case being pronounced on the 12th July, 1875, and the judgment in the *Wood* case being pronounced in the Michaelmas term of 1874. The then learned Chief Justice of the Common Pleas, the late Chief Justice of Ontario, Sir John Hagarty, in delivering the judgment of the Court, expressed the difficulty the Court felt in the absence of any written or recorded evidence of the joint action of the directors, and sent the case back for a new trial, setting aside a verdict for the plaintiff, and gave the plaintiff the opportunity of supplying such evidence.

I observe that the same learned Judge in the case of *Thorold v. Neelon* (1891), 18 A. R. 658, at p. 665, expressed a similar view. I extract the following passage from his judgment: "It is a matter of the gravest importance in all dealings with or by a corporate body that its actions shall be evidenced not by verbal statements or admissions of its directors or other officers, but by the

records of their proceedings kept by the appointed officers. They act through their officers—their governing body may be changed from time to time, and different courses of action be adopted—the law, I think, must require the written evidence of their books and not the informal and possibly contradictory verbal statements of witnesses to prove what was done or intended by such governing body.” That opinion was not approved of by the learned Chief Justice of the Supreme Court in the same case, 22 S. C. R. 390. At page 395 that learned Chief Justice refers to the opinion of Lord Justice Bowen in *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. at p. 289, with approval. The Chief Justice said: “In that case the Lord Justice was of opinion that the want of formality in the proceedings of the company could not affect a third party with whom it was dealing. The other Lord Justices differed, it is true, but on a ground which did not call for any opinion on this point. It has long been the doctrine of the Courts, as I understand it, that mere irregularities in the internal proceedings of corporations and joint stock companies do not affect persons contracting with the corporation or company. I do not think that such a doctrine is the less applicable in the present case for the reason that Mr. Neelon was himself a director and had notice of all that was done.” In this judgment the majority of the Court concurred.

Judgment.

Rose, J.

In Brice on Ultra Vires, p. 614, the learned author says: “The true legal ground upon which the decisions are based would seem to be, however, rather that of estoppel than *de facto* agency.”

Without going more fully into the evidence, I think that I state fairly the result when I say that it would be inequitable to permit the company now to set up in answer to the plaintiff's claim that Burk had no authority to employ the plaintiff to do the work which he did do for the company and in its interests, and that on these facts the company is estopped from setting up any such defence. And, notwithstanding the observations made in *Wood v.*

Judgment. *Ontario and Quebec R. W. Co.*, I think I am warranted by the authorities to which I have referred in supporting the view the learned Chancellor took at the trial, and disallowing the objection against such decision on such ground.

Rose, J.

I would also refer to the observations of the present learned Chief Justice of the Common Pleas in *Bain v. Anderson* (1896), 27 O. R. 369, at p. 373, where the case of *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, is referred to. See also *Canada Central R. W. Co. v. Murray* (1883), 8 S. C. R. 313.

I think, therefore, that the finding of the learned Chancellor in favour of the plaintiff on the fact of the contract and the work done and the value of it and the liability of the company for such work should be supported.

But it was urged that, even if the company was liable, the learned Chancellor exceeded the powers of the Court in ordering payment of the debt out of the moneys in Court. I was much pressed with this objection for some time, by reason of the absence from the record of the Messrs. McKenzie, who were the purchasers of the undertaking, for it seemed to me upon the contract whereby the defendants Burk, Gorham, Clavet, McTague, Mitchell, and Dwyer agreed with the McKenzies that the transfer should be made to the McKenzies free and clear from all incumbrances, or, as put in clause 2, clear from all liens and incumbrances, that the McKenzies would have the right, if before the Court, to ask the Court, before ordering payment out of Court of the moneys, to see that a sufficient portion was applied in payment of this judgment debt, which would be, in the fair sense of the term, a lien or incumbrance upon the undertaking. It was a debt which the members of the company had undertaken to pay and to protect the McKenzies against, and the money could not properly or justly be distributed among the shareholders of the company until this was paid. But it seems to me that the defendants Burk and Dwyer, who submit to the order of the Court, and who are willing that this

judgment debt should be paid out of the moneys in Court, have also an equity to ask the Court to see that before this money is paid out to the shareholders, this debt should be discharged out of it.

Judgment.
Rose, J.

I am not expressing any opinion against the propriety of the order on the ground that this money was the money of the company, and, therefore, that under *Jones v. Miller* (1893), 24 O. R. 268, the order is sustainable. Upon this point I express no opinion one way or the other.

I think that if the order for the payment of the money out of Court in satisfaction of this judgment was right, it was also right that the plaintiff's costs of the action and the costs of the defendants Burk and Dwyer should be also paid out of the same fund, the proper parties thus being made to bear the costs of the litigation. If any one could object to such order, it would be Burk and Dwyer, who are thus made to pay a portion of the costs of the litigation.

As to the objection that the learned Chancellor founded his decision in this action not only upon the evidence which was formally given in this action, but also upon the evidence given in the action of *Burk v. Mitchell*, I do not think it necessary to say more than that the evidence in this action, in my opinion, fully justified the conclusion. At the same time, I am not at all convinced that he was not perfectly justified in considering the whole of the evidence, from what took place before him in Court between counsel.

The motion must be dismissed with costs.

MACMAHON, J., concurred.

E. B. B.

ATKINSON ET AL. V. CITY OF CHATHAM.

Municipal Corporations—Highway—Obstruction—Telephone Pole—Non-repair—Runaway Horses—Liability—Notice—Contributory Negligence—Indemnity—Telephone Company—Erection of Poles—Sanction of Corporation—Damages.

A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole planted twelve feet from the centre line and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants:—

Held, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was not in good or reasonable repair; and the city corporation, having notice and knowledge of the obstruction, and also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained.

Sherwood v. City of Hamilton (1875), 37 U. C. R. 410, followed.

Foley v. Township of East Flamborough (1898), 29 O. R. 139, distinguished. Driving a horse that had before run away, as one of a pair of horses, was not, of itself, negligence contributing to the disaster.

Held, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation and with their sanction, under an agreement entered into with them, and they could not recover indemnity from the telephone company by whom it was erected. Quantum of plaintiffs' damages considered.

Statement. THIS was an action for damages for non-repair of a highway, tried before FERGUSON, J., without a jury, at Chatham, on the 16th, 17th, and 18th May, 1898. The facts are stated in the judgment.

Atkinson, Q.C., and *C. R. Atkinson*, for the plaintiffs.

Douglas, Q.C., and *Aylesworth, Q.C.*, for the defendants.

M. Wilson, Q.C., for the Bell Telephone Company, third parties.

July 16, 1898. FERGUSON, J.:—

There are three plaintiffs, Mary Louise Atkinson, an infant, who sues by her next friend, George R. Atkinson, the said George R. Atkinson, and Nathan H. Stevens.

The action is to recover damages from the city of

Chatham for alleged negligence in not keeping a certain street in the city in proper repair and condition, in consequence or by reason of which an accident happened to the injury of the plaintiffs; the plaintiff Mary Louise Atkinson having had her leg broken, the plaintiff Nathan H. Stevens having had his horses, carriage, and harness injured, and the plaintiff George R. Atkinson having incurred, as is alleged, certain expenses in respect to Mary Louise Atkinson, and the injury to her, she being his daughter.

Judgment.
Ferguson, J.

The carriage and team that were being driven on this street in the month of December, 1897, belonged to the plaintiff Stevens, and were being driven by his son. He, the son, had invited Mary Louise Atkinson to ride with him, as his friend and guest. The time was the commencement of sleighing, and, as I understood the evidence, they were driving on King street in the city, for pleasure. The carriage or sleigh was the body of a wheeled carriage, the wheels having been taken off, and short runners put on instead. There were others in the sleigh, but they were not injured by the accident, and do not complain.

King street, the street on which the sleigh was being driven, runs east and west, or nearly so, until, in order to conform, in a measure, to the course of the river bank, it turns at an angle, as was said by a professional witness, of one hundred and seventeen degrees to the south. It was shewn that King street from the east, and as far westerly as this angle, or thereabouts, was in good repair, and had upon it what at the time was called, and apparently known to the residents as, the "new pavement." The other part of the street, the part lying southward of the angle, was not in so good condition, and much evidence was given respecting the defects and want of repair in it. There was a line of telephone posts or poles on the westerly side of the part of the street lying southerly from the angle. One of these poles, the last one of this line proceeding northward, and the first one proceeding westward on King street and turning the angle to the south, was

Judgment. about sixty feet southward from the angle, the measurement being made on the middle or centre line of the street, that is, from the angle formed by the centre lines, each on its portion of the street. This pole or post was planted and standing at the distance of twenty-one feet from the westerly margin or limit of the street, that is, the part or portion of the street lying southerly from the angle aforesaid, the street at this point, as elsewhere, being the usual width of sixty-six feet. Though this pole was so far out upon the street and was an obstruction, it appeared by the evidence, and was, I think, conceded, that by driving with ordinary care in daylight all danger would be avoided. It was, however, as will be seen by the figures, standing within the distance of twelve feet from the centre line of the street, and within about sixty feet southerly from the point at which a team going westerly on one part of King street would turn the angle to go southerly on the other part, and on the outer or convex side of the curve that a team would naturally describe in turning at the angle, that is, assuming that such curve would extend so far southward as the post and fall to the easterly side of it.

It appeared that this occasion was the first sleigh drive of the season with this team. It was apparently assumed that when the wheels were taken off the carriage and the short runners put on, it was necessary in attaching the horses to lengthen the traces, and it appeared from the evidence that this was not done. It was shewn that during the drive, and before the disaster, the sleigh, or some part of the "rig," had struck or touched the horses' hind legs, but it did not appear by the evidence that those things, or either of them, were in any degree the cause of the horses running away as they did. It was also shewn by the evidence that one of the horses had run away on two former occasions, with a different mate on each occasion, but on neither occasion with the present mate. These occasions were long prior to the time of the present disaster.

The son of the plaintiff Stevens was driving with his friends for pleasure on the part of King street which runs east and west or nearly so, on which the good pavement was, and at some point far easterly from the angle in the street before mentioned the horses became unmanageable by the driver, and "ran away." He had been driving each way upon the street, that is, driving one way for a distance, and then turning about and going the opposite way. He said in his evidence that he did this because the best sleighing was on this street and on this part of it where the new and smooth pavement had been laid.

At the time the horses became unmanageable by him they were going westward and towards the angle in the street, but at a very considerable distance from the angle. I think it is not possible from the evidence to determine the precise point or place at which the horses became unmanageable by the driver, or the real cause of their having taken fright and run away. Some of the witnesses seemed to be of the opinion that it was caused by another team, which was called the black team of Holmes, being driven past them, but I did not at the trial become satisfied, nor am I now satisfied, that such was the fact. Certain it is, however, that while the sleigh was going westward on this part of King street, the horses for some reason got from under the control of the driver. It rather appears that this took place gradually, for some of the witnesses were of the opinion that they were from under his control whilst they were still trotting. They, however, seem to have gone faster and faster, so that, before and at the time they came to the angle in the street, they were going at what may be called the "full run," as fast as they were able to go. The witnesses do not describe this progress along King street alike. I am not surprised at this, nor at the fact that witnesses thought that the driver had lost control of the horses, when he himself thought he had not. From all the evidence I would think it simply a case in which the driver fought hard for the control of his horses, but finally lost.

Judgment.
Ferguson, J.

Judgment. it, and this last before, and some distance before, he came
Ferguson, J. to the angle in the street. There can, I think, on the evidence, be no reasonable doubt that the team approached this angle in the street and made the turn thereat on the full run, going as fast as they were able to go. The witnesses did not agree as to the condition of things at the period when the team was turning the angle, or rather, making the curve at the angle of the street. Two witnesses who were looking from some distance eastward from the angle, and from points on the south side of the street, were of the opinion that the sleigh upset at the angle. They said they saw at that point the runners under one side of the sleigh up off the ground, so much so that they could see under those runners and the bottom of the sleigh, and they thought it went over. These witnesses lost sight of the sleigh immediately after it made the turn, perhaps a little before the turn was completed, and their time for observation at this point must have been only an instant. One witness says that he saw the sleigh all the way from the angle of the street to the post above alluded to, and that it did not go over till it reached the post. The evidence of Miss Atkinson, who was sitting on the seat beside the driver (at his left side), is that the sleigh did not turn over till it reached the post. The evidence of the driver as to this subject is: "The sleigh was not dragged on its side at all. It was on one runner at the time it struck the post. I think, if there had been no post there, the sleigh would have righted, and possibly, or probably, I might have escaped without injury." This post was so far out upon the street that people had been driving, and there was a beaten road or track, between it and the sidewalk. The driver says he did not endeavour to take this track, however, and I think it manifest that the sleigh did not take this track.

Although there was much evidence shewing or going to shew that the street southward of the post or pole was in a bad condition, it was shewn that the street between the angle and the place of the pole was not in a bad condition, but was fairly good.

It was sought to be shewn that there were "ruts" in the track of the road immediately north of the post, and that these were the cause of the sleigh striking the post, but, with the best consideration I have been able to give this evidence, I think it fails to shew what was contended and what it was given for. The contention that if the street southward of the pole had been in a state of good repair, the driver would or might probably have guided the team upon it, and thus have passed the post, may, I think, also be laid aside.

This part of the case may, I think, be looked at in this simple way. The horses approached the angle of the street at a very high speed—as fast as they were able to run. They had to make the turn, and in so doing described a curve, and in doing this they brought the sleigh against this post or pole, and the disaster there occurred; the horses having been for some time, some distance, from under the control of their driver, although he might still have had some power, some little power, by way of a power to guide, or, so to speak, "steer" them. When one says they were "running away," this perhaps expresses all as clearly as one can state it. One who has ever been much accustomed to horses knows what this means, and further descriptions seem to me to tend towards confusion only.

Notwithstanding the evidence that all danger could be avoided by driving with ordinary care in daylight, I am of the opinion, and I think I am bound to find, that this pole was an obstruction on the street, standing, as it did, so far out, and as near the middle of the street in the city of Chatham as it did; and I further find that the street at this point, from this cause alone, was out of repair, was not in good or reasonable repair. The evidence is abundant to find, and I find, that the corporation had knowledge and notice not only of the fact that the obstruction existed, but also that it was considered by some, at least, to be of a dangerous character. John Piggott in his evidence says: "I mentioned the danger of this pole to the council in

Judgment.
Ferguson, J.

Judgment. 1894, when I was in the council, and neither they nor the
Ferguson, J. board of works took any notice of it." This seems very direct evidence, and there is much more evidence, if more were necessary, to shew that the corporation had notice and knowledge of the obstruction.

Then I think that the contention that there was contributory negligence on the part of the plaintiffs must fail. The not lengthening of the traces was not shewn, nor was the fact of some part of the "rig" having touched the hind legs of the horses after the commencement of the drive shewn, to have any connection whatever with the horses running away. Nor was it shewn that either of these contributed in any degree to the disaster. The inference that I drew from what was said about these facts was that they did not, nor did either of them, cause or contribute to the misfortune.

I cannot say that driving a horse that had before run away, as one of a pair of horses, was of itself negligence. Can one say that because a horse has once run away, he is never to be driven again, without the driver being guilty of negligence? I think not. Searching all the evidence through, I do not find proved anything that seems to me to have been negligence on the part of the plaintiffs, or any of them, contributing to the disaster.

In no view of the evidence here could it be found that Miss Atkinson was guilty of contributory negligence: see the case *The Bernina* (1888), 13 App. Cas. 1, overruling *Thorogood v. Bryan* (1849), 8 C. B. 115, and *Armstrong v. Lancashire, etc., R. W. Co.* (1875), L. R. 10 Ex. 47: and her claim appears the most substantial one made against the defendants.

I find then that there was negligence of the defendants that was the cause of the misfortune, and I find that contributory negligence of the plaintiffs was not proved or established, and, looking at the case *Sherwood v. City of Hamilton* (1875), 37 U. C. R. 410, as well as many others, I am of the opinion that the plaintiffs have established their claim against the defendants. I have also seen the

case *Foley v. Township of East Flamborough* (1898), 29 O. R. 139, and noticed what is there said by the learned Chief Justice in delivering the judgment of the Court. The difference between that case and the present one is clear. There the Court found that in all the circumstances the road was, notwithstanding the existence of the stump, in a reasonable state of repair; but here I have found, as above, that the street was not in such repair. It seems clear to me that this injury would not have been sustained but for the defect—the obstruction—in the street, though it is not possible to say what would have been the outcome of the runaway or what other injuries, if any, might have been sustained if the pole had not been there.

Judgment.
Ferguson, J.

The defendants gave notice to the Bell Telephone Company of the action and what is claimed by the plaintiffs. In the notice the defendants claimed that the telephone pole was erected by the company unlawfully, and that it was expressly agreed, pursuant to a by-law of the defendants dated the 20th February, 1893, and an agreement of the same date, that in placing their telephone poles the company would not interfere with the public right of travelling on the streets, and calling attention to the amending Act of 1882 (O.) limiting the powers of the company in the same way, and claiming that, if the plaintiffs are entitled to recover damages, the company must protect and indemnify the defendants in respect of the same.

The telephone company come in and defend. In their defence they say, amongst many other things, that this pole was erected in its position in the year 1893, by the direction and with the knowledge and consent of the defendants, or of their board, committee, or officers in that behalf, and that since then and up to the time of the accident it remained in that position with the knowledge and acquiescence of the defendants, and that the defendants did not at any time previous to the accident make any complaint or objection to its continuing in that position or request its removal. The company (as a third party)

Judgment. again allege that the pole was so put and maintained by
Ferguson, J. the directions, acquiescence, and consent of the defendants, and that the defendants alone had power or authority to remove the same.

By sec. 2 of 45 Vict. ch. 71 (O.), the telephone company are not to erect poles more than forty feet above the surface of the street without the consent of the municipal council.

The company desired to erect poles in Chatham of a greater height than forty feet, and applied to the municipal council in this respect.

On the 13th day of February, 1893, an agreement, authorized by by-law of the corporation, was made between the corporation and the company. This agreement recites, amongst other things, that it may be necessary for the company to erect in the streets of Chatham poles of a greater height than forty feet, and that the council of the corporation had passed a by-law authorizing the execution of the agreement and consenting to the terms contained in it.

This agreement contains mutual covenants, and seems to be for a good and substantial consideration to the corporation. By it the corporation agreed to permit the company to erect, under the supervision of the town engineer, or other officer of the corporation appointed for that purpose, poles of as much greater height than forty feet above the streets as might be necessary, in place of the company's then smaller poles, wherever the erection of such higher poles might be necessary for the purposes of the company. (The tautology is copied from the agreement.)

The line of poles of which the pole in question is one was planted in the year 1893 in pursuance of this agreement and by-law. Before planting them one Buckley, the lineman of the company having charge of the section, wanting the authority and concurrence of the corporation, after making some inquiry and search as to who was the proper officer to supervise the planting and location of the

poles, went to one Stone, who told him who composed the board of works, and sent him to Read, a member of the board, who sent him to Delahanty, who was an officer of the corporation, the street surveyor. Delahanty, after some hesitation in respect to his other work, went with Buckley, and, according to all the evidence, located one pole of this line of poles. This was at the corner of King and Licioux streets, many hundred yards from the pole in question. This pole was fifteen feet from the westerly limit of the street. Delahanty says he then told Buckley to put down the poles in a straight line, and at that distance from the west limit of the street. Kelly was a lineman of the company at the time, and was present on the occasion of locating this line of poles. He and Buckley both swear that Delahanty did much more in regard to placing the line of poles than Delahanty says. They both say that Delahanty held one end of the line and located the place for the pole in question. Judgment.
Ferguson, J.

Delahanty was recalled, being the last witness, and he said he had no recollection of locating the pole in question, as stated by these two witnesses, and finally says he did not do it. And in his examination for discovery, the whole of which was read as evidence, he had said that he did not give any instructions to plant the pole in question where it is, though he says he did locate the line of poles.

Upon the evidence of these witnesses, I think the proper finding is that Delahanty, the street surveyer, did point out the position of this pole in question, and if so, there can be no real doubt that it was planted in the place indicated by him.

It was sought to be disputed that, even assuming that Delahanty did do this, he was the proper officer or a proper officer for the purpose within the meaning of the agreement, and it was intimated that the corporation should not be bound by what he did. The agreement says, "under the supervision of the town engineer, or other officer of the corporation appointed for the purpose." It is true that Delahanty was not appointed for this

Judgment. specific purpose, but he was an officer of the corporation
Ferguson, J. appointed by a by-law, namely, street surveyor, an office, the duties of which, would seem to be as nearly related to this duty as those of any other office in the corporation, if not more nearly. It does not appear that any officer was appointed for the purpose under the agreement. The officer of the telephone company wanted to put up the line of poles. The evidence shews that he was at a good deal of trouble to get an officer to superintend the placing of them under the agreement. At last Delahanty was, to say the least of it, in some way designated, and he, on all the evidence, did undertake the work of superintending. The poles were put up. The corporation were aware of the location of them from the beginning in 1893 till the time of the accident, and never once made any objection. They knew that the company could not place such poles without their permission, and I cannot but think that as between the municipality and the company it should be held that the poles, including this pole, were put up under and sufficiently in accordance with the agreement.

I think the corporation of Chatham should not now be permitted to say that the company put up the pole in question without their sanction under the agreement; and I cannot think it any more exalted than a subterfuge to contend, in the face of all that appears, that Delahanty had no definite authority under the agreement, and that therefore the pole was located without the sanction of the corporation.

Then, if it be assumed that the pole was planted where it stood under the superintendence of the corporation and with its sanction, I do not see how the corporation can recover indemnity from the company.

The true result seems to me to be that the corporation of Chatham is liable for damages to the plaintiffs, but is not entitled to indemnity from the telephone company, the third party, though it may be that the telephone company would have been held liable had they been sued directly by the plaintiffs. The question then would have been altogether different from the one here.

It remains to assess the damages.

Judgment.

As to the plaintiff George R. Atkinson, I suppose the two doctors' bills have to be paid by him. One of these is \$20; the other is \$25. There was, besides, nursing and attendance of his daughter at his house, for which there should be an allowance made. The evidence given was not very definite, but I think \$120 for him will be about right.

Ferguson, J.

The plaintiff Nathan H. Stevens seems to have lost, by injury to his carriage, horses, etc., about \$125, and I think I shall not be wrong in allowing him this sum—\$125.

The plaintiff Mary Louise Atkinson had her leg broken. She was five weeks in bed and eight weeks on crutches. At the time of the trial she was able to walk about as well as ever she did, though occasionally suffering some pain. She seems not to have sustained any permanent injury. No doubt she suffered such pains as are consequent upon a broken bone. There was evidence of disappointment in her educational course, and supposed pecuniary loss in consequence. I confess that I am puzzled to know what sum to allow to her as damages. After mature consideration I have arrived at the sum of \$750.

The defendants will pay the plaintiffs' costs and the costs of the third party, the telephone company.

E. B. B.

LEGGATT V. BROWN ET AL.

Contract—Consideration in Part Illegal—Stifling Prosecution.

The manager of the business of an insolvent firm was arrested and imprisoned on a charge of having procured the firm, while in insolvent circumstances, to transfer certain of its property to another person with intent to defraud the creditors of the firm. After he had been released on bail an offer was made in writing by his wife and her son to the creditors of the firm to pay a certain percentage of their claims, in addition to the dividend to be paid by the estate of the firm, and to withdraw certain actions and procure the abandonment of certain claims, upon conditions set out in the offer, one of which was that any creditor accepting the offer should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. This offer was accepted by the plaintiff and a number of the other creditors. After it was made, the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage. In an action by one of the creditors upon some of the notes:—

Held, that, although not stated in express terms, one object of the defendants in making their offer was to procure the stifling of the prosecution of the charge made against the husband; that it was in accordance with the concluded agreement made by the defendants with the plaintiff and the other creditors that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given on the illegal agreement thus entered into, could not be enforced.

Rawlings v. Coal Consumers' Association (1874), 43 L. J. M. C. 111; *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351; and *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, followed.

Held, also, that as part of the consideration for the agreement was illegal, the whole was bad.

Lound v. Grimwade (1888), 39 Ch. D. at p. 613, followed.

Statement.

THIS was an action tried before MACMAHON, J., without a jury, at Ottawa, on the 15th and 16th June, 1898. The facts appear in the judgment.

George Kerr, for the plaintiff.

J. E. O'Meara, for the defendant Patterson.

Wyld, for the defendants Altha Ann Brown and J. W. Baker.

Fripp, for the defendant W. E. Brown.

June 27, 1898. MACMAHON, J.:—

Judgment.

MacMahon,
J.

The plaintiff is a merchant in Montreal, and brings the action on his own behalf, as well as on behalf of all other creditors of the defendant Altha Ann Brown.

The plaintiff on his own behalf seeks to recover from the defendants Altha Ann Brown and John Walton Baker the sum of \$335.43, being the amount of three promissory notes made by them, for \$111.81 each, dated the 1st September, 1896, payable to the plaintiff in twelve, fifteen, and eighteen months from the dates thereof.

The defence to this part of the claim is that William E. Brown, the husband of the defendant Altha Ann Brown, was under arrest and imprisoned on a charge made by James Robinson, a creditor of W. E. Brown & Co., for that he (W. E. Brown), while manager for Charles Ernest Baker of a business carried on by him in the name of W. E. Brown & Co., procured said firm, while in insolvent circumstances, to transfer and deliver certain goods, the property of said firm, consisting of boots, shoes, etc., to one W. J. Saunders, with intent to defraud the creditors of said firm of W. E. Brown & Co., and while the said W. E. Brown was so under arrest and in prison, a proposition was made to the defendants by and on behalf of the plaintiff and the other creditors of W. E. Brown & Co., that, if the defendant Altha Ann Brown would agree to make and deliver to the plaintiff and other creditors of the said W. E. Brown and Co. the joint notes of herself and the defendant John Walton Baker, securing twenty-five cents on the dollar of the creditors' claims against said W. E. Brown & Co., over and above the sum realized out of the assets of the said firm, the charge would not be pressed, and that the said W. E. Brown would be discharged from custody; that the defendants agreed to make said notes (including those sued on in this action), and upon the making thereof and in fulfilment of said agreement, the said W. E. Brown was discharged from custody; that the said notes now sued on were delivered by the defen-

Judgment.
MacMahon,
J.

dants to the plaintiff and accepted by him to stifle and compromise said proceedings on the said criminal charge, and there was no other value or consideration for the making or delivering thereof to the plaintiff.

On the 26th August, 1896, an offer signed by Altha Ann Brown and John Walton Baker, and headed "in the matter of the estate of W. E. Brown & Co.," was made to the creditors of that firm, in which it was recited that the said firm had made an assignment for the general benefit of creditors to P. I. Bazin, who had realized on a sale of the property taken possession of by him, and that he then had in his hands a balance of \$4,084.46, and that there was not sufficient to pay the debts of said firm in full; that some of the creditors of said firm claimed that Altha Ann Brown composed, or was a member of, said firm, and was responsible for the debts thereof, which she denied; that proceedings had been taken in respect of the said estate and of the rights of the creditors thereof, as against Charles Ernest Baker and Altha Ann Brown; that Altha Ann Brown, John Walton Baker, and W. E. Brown claimed to be creditors of said firm, and had proved against said estate for claims alleged to be due them, and such claims having been contested by the assignee, they had instituted actions against him for the establishment of the same; that Altha Ann Brown and John Walton Baker, being desirous of bringing about a settlement of all matters in dispute in connection with the estate and business of the said W. E. Brown & Co., proposed to the creditors of the said W. E. Brown & Co. who should agree thereto, provided that such creditors represented not less than one-half of the debts of said firm shewn on the schedule thereto, as follows:

"1. That all the said actions and proceedings be withdrawn or discontinued without costs and that proper releases be executed; the plaintiffs in said actions being entitled to withdraw any money by them respectively deposited as security for costs therein.

"2. That it be admitted by all said creditors that the said firm of W. E. Brown & Co. is, and always has been, composed of Charles Ernest Baker alone.

"3. That all books, account books, documents, letters, copies of letters, and other papers relating to, or connected with, the said business of W. E. Brown & Co., or any transaction connected therewith in the custody, possession, or power of the said creditors, or any of them, or of the assignee or inspectors of the said insolvent estate, or any of them, or of any other person or persons on their own behalf or on behalf of any of them, be delivered up to us.

Judgment.
MacMahon,
J.

"4. That the sale of goods by W. E. Brown & Co. to W. J. Saunders, of Smith's Falls, be confirmed, and that I, Altha Ann Brown, be entitled to hold the notes of the said Saunders and George H. Saunders given for said goods.

"5. That all our claims against the estate of the said W. E. Brown & Co. to the moneys in the hands of the said assignee be withdrawn and released.

"6. That we will procure the abandonment of the claims of W. E. Brown, D. McCallum, and the Molsons Bank, Ottawa, respectively filed against the said estate, and the discontinuance of the action brought by the said W. E. Brown against the said assignee for the establishment of the several claims filed by said W. E. Brown against the said estate, each party thereto paying his own costs; each creditor accepting this proposition being thereby held to agree that he will not hereafter, directly or indirectly, institute or be a party to any action or proceeding against the said W. E. Brown, or the said Daniel McCallum, or any other person whomsoever, in respect of any matter or thing in any wise connected with the affairs or business of the said Charles Ernest Baker or the said firm of W. E. Brown & Co.

"7. That the said moneys in the assignee's hands be divided among the remaining creditors of W. E. Brown & Co. in accordance with the provisions of the law in that behalf, or as the said creditors may otherwise agree.

"8. That we will pay to each of the creditors assenting hereto, in addition to the amount payable to him by the said assignee, and in consideration of such creditors, in addition to agreeing to the foregoing propositions, or such

Judgment. of them as are to be executed, done, or performed by them,
MacMahon, releasing the said Charles Ernest Baker and the said
J. Altha Ann Brown from all further claim and demand whatsoever in respect of the business of the said Charles Ernest Baker, or the said firm of W. E. Brown & Co., a sum equal to twenty-five cents in the dollar of the claim now proved or which may hereafter be proved by him against the estate of the said W. E. Brown & Co., which sum to be payable without interest in eight equal consecutive quarterly instalments, and to be secured by our joint and several promissory notes dated the 1st day of September, 1896, and falling due respectively in 6, 9, 12, 15, 18, 21, 24, and 29 months from that date."

The offer (paragraphs 9, 10, 11, and 12) then provides for collateral security being given by Altha Ann Brown for the payment of the promissory notes, by depositing with a bank in Ottawa a policy of life insurance upon the life of one J. H. Dwyre for \$5,000, but the premiums on the policy Altha A. Brown was not bound to pay, etc.

"13. The said W. E. Brown and Daniel McCallum to release James Robertson, and all persons acting on his behalf, from all claim for damages for false imprisonment or otherwise."

The above offer was accepted by the creditors representing the requisite amount of the claims against the said firm; and an agreement was afterwards executed by such creditors (including the plaintiff) in which they accepted the dividends they were entitled to out of the proceeds of the said estate, and also the promissory notes of Altha Ann Brown and John W. Baker, covering an additional twenty-five cents on the dollar, in full satisfaction of all their claims against the said firm of W. E. Brown & Co., Charles Ernest Baker, and Altha Ann Brown.

Altha Ann Brown, who was called as a witness by the defendants, said that she gave the notes in order to get her husband out of gaol, and that when she signed the notes she did not intend to pay them. W. E. Brown had been in gaol until the 17th August, but from that date

and at the time the offer was made by his wife and her son, John Walton Baker, on the 26th August, 1896, he had been out on bail; so it is not the fact that it was for the purpose of effectuating his release from custody that the offer was made, but I find it was made to stifle the prosecution of her husband on the charge mentioned in the statement of defence. After the offer was made, W. E. Brown appeared before the police magistrate at Ottawa, but the informant, James Robinson, not appearing, he was discharged. The notes for the twenty-five cents on the dollar were signed by Altha Ann Brown and John W. Baker after the criminal proceedings were terminated by the discharge of W. E. Brown.

Judgment.
MacMahon,
J.

By the 13th clause of the offer, W. E. Brown and Daniel McCallum are to release James Robinson and all persons acting on his behalf from all claims for damages for false imprisonment. And McCallum, while in prison, and in consideration of Robinson agreeing to abandon the prosecution against him, released Robinson from all claims for damages by reason of his having caused McCallum's arrest on the charge of having committed forgery in altering entries in the ledger of the firm of W. E. Brown & Co., of which firm he was the book-keeper. McCallum afterwards brought an action against Robinson, and I held in that case, on the authority of *Keir v. Leeman* (1846), 9 Q. B. 371, and *Rawlings v. Coal Consumers' Association* (1874), 43 L. J. M. C. 111, that the release formed no defence to the action.

The sixth clause of the offer provides that any creditor accepting agrees that he will not "institute or be a party to any action or proceeding against the said W. E. Brown or the said Daniel McCallum." Then what is the meaning or intention of this? The only proceeding against W. E. Brown disclosed in the evidence was the charge made by Robinson against him on the 30th July, 1896, and upon which he was arrested, of having, while manager of the firm of W. E. Brown & Co., and at a time when that firm was insolvent, procured the firm to make a transfer

Judgment.

MacMahon,
J.

of certain goods and chattels, consisting of twenty-two cases of boots and shoes, mitts, moccasins, etc., and seven cases of rubbers, to one W. J. Saunders, with intent to defraud the creditors of the said firm. It was intended that the plaintiff Leggatt should be the complainant against W. E. Brown, and his name was first inserted as the complainant in the information, but, it being discovered that his claim against the firm of W. E. Brown & Co. had not matured, James Robinson, who was then in Ottawa, was substituted as complainant.

Then what are the "proceedings" referred to in the sixth paragraph of the offer? I find that they referred to and included the criminal proceedings then pending against W. E. Brown, and were in fact the "proceedings" which, at the time of the offer, and its acceptance, were pending against him, and of which proceedings the plaintiff was fully cognizant, and, as I have pointed out, in respect of which he was nearly becoming the prosecutor.

In *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351, the head-note is: "The plaintiffs, who were a local board, brought an indictment against the defendants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties, and sanctioned by the Judge, and was afterwards confirmed by a deed executed by the plaintiffs and defendants. By this deed the defendants covenanted to restore the road, which they had broken up, within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of 'not guilty' on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant, claiming specific performance and damages:—*Held* (affirming the judgment of Stirling, J.), that as the indictment was for a public injury, the agreement to consent to a verdict of 'not guilty' was against public policy and illegal, and the plaintiffs could not maintain an action on the defendants' covenant. The action was therefore dismissed."

Jones v. Merionethshire Permanent Benefit Building Society, [1891] 2 Ch. 587, is a most instructive case. There the secretary of a building society who had made default and was threatened by the society with a prosecution for embezzlement, applied for assistance to the plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes to the society. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society:—*Held*, that it was an implied term of the agreement that there should be no prosecution, that the agreement was founded on an illegal consideration and void, and that the promissory notes ought to be set aside.

Judgment.
MacMahon,
J.

Williams, J., in his judgment, at p. 594, says: "It seems to me that the authorities come to this, that whenever there is an agreement not to prosecute, that is an illegal consideration to form a part of any contract, and the contract will be void. I do not think it makes any difference whether the agreement is expressed or implied. In fact, in the case of *Williams v. Bayley* (1866), L. R. 1 H. L. 200, and also in the case of *Brook v. Hook* (1871), L. R. 6 Ex. 89, the agreement not to prosecute was only implied; and in *Williams v. Bayley* the bargain included the giving up of the documents which were the *indicia* of the crime. The rule of law is, that whenever an agreement is made in consideration of a promise not to prosecute, such an agreement is made for an illegal consideration, and cannot be enforced, and will give the persons seeking to set aside such agreement the right to be put in the same position as they were before the agreement was entered into." * * And at p. 596: "It would seem to be clear, that so far as the persons giving the security are concerned they must be cognizant of the crime which the person whom they seek

Judgment.

MacMahon,
J.

to help has committed, otherwise the doctrine does not seem applicable at all. That is present here, because there is no doubt that Mr. and Mrs. Jones both knew that their relative had been guilty of these frauds. Then one must, I think, also find that the persons coming forward and taking upon themselves the debt, must have been actuated by the desire to prevent a prosecution. That also is present here. I have no doubt that Mr. and Mrs. Jones, in coming forward, were actuated by the desire to prevent a prosecution, and somehow or other it seems to me that the very form of agreement which, in my view, put an end to the indebtedness of Cadwaladr for the £526 altogether, was, to some extent, affected by their desire that the matter should be so carried through as to most effectually give them that which they wanted—that is to say, the prevention of the prosecution. But that is not enough; something is wanted on the other side. Now, on the other side there must be, in the first place, either an intention to prosecute or threats to prosecute, and I find here that there were threats to prosecute. But then something more is wanted on that side. I think that the person receiving the promise or the security must be aware that the person giving the promise or the security would not have come forward but for the threat or the probability of the prosecution.”

The only other authority from which I consider it necessary to make any citation is *Rawlings v. Coal Consumers' Association* (1874), 43 L. J. M. C. 111, where a motion was made for a rule to stay further proceedings in the action, upon the ground that the writ of summons had been issued against good faith. The action was for false imprisonment and malicious prosecution. The facts appear sufficiently in the judgment of Lord Coleridge, C. J., at p. 112. He says: “Three indictments for criminal offences were preferred against the plaintiff; he was tried and acquitted upon one, and thereupon it was arranged between the counsel on either side, with plaintiff's assent, that the prosecution of the two remaining indictments should be

abandoned, upon condition that the plaintiff should bring no action against the prosecutors, the present defendants, for either trespass and false imprisonment or malicious prosecution. It is alleged that this action has been commenced in violation of the supposed contract; but in my opinion Courts of law ought to look at agreements of this kind with strong dislike, and ought to use every means to prevent them from being enforced. A person who has been arraigned upon an indictment is not altogether a free agent; if we were to uphold compromises of the nature here disclosed, a person who had been wrongfully indicted, and had been induced to agree to bring no action, might be deprived of his right of redress by suing for either trespass and false imprisonment or malicious prosecution, as the facts may require. Moreover, a prisoner upon his trial is entirely in the hands of his counsel, and may ill understand what it is to which his assent is asked. I do not see any escape from this dilemma; either the counsel for the prosecution, at the time the agreement was entered into, knew that the evidence did not warrant a conviction, in which case there was no consideration for the plaintiff's promise not to bring an action; or he thought there was a reasonable chance of bringing guilt home to the plaintiff, in which case he was foregoing a public duty, in order to gain a private advantage. The counsel for the prosecution ought to have recollected that he was the guardian of the public interests, and ought not to have been a party to compounding the rights of the Crown. It ought to have occurred to him that he either was offering no consideration for the plaintiff's alleged promise not to sue, or was stifling a prosecution for felony."

Judgment.
MacMahon,
J.

And Brett, J., said: "I think it right to state that such agreements as that brought before us are wholly illegal. If the case for the prosecution could not be proved, there was no consideration for the plaintiff's promise; or if it was possible to establish the plaintiff's guilt, a prosecution for felony was stifled. I entirely agree with the judgment of my Lord. I have a difficulty in seeing any difference

Judgment. between an agreement of this kind and a promise to dis-
MacMahon, continue a prosecution for felony upon payment of the
J. sum of £100. In the present case a prosecution for felony was stifled, a proceeding which is abhorrent to the law of England."

Reference may also be had to *Williams v. Bayley* (1866), L. R. 1 H. L. 200, particularly at pp. 210 and 211; *Keir v. Leeman* (1846), 9 Q. B. 371; *Ex p. Wolverhampton Banking Co.—In re Campbell* (1884), 14 Q. B. D. 32; *Elliott v. Richardson* (1870), L. R. 5 C. P. 744; and *Seear v. Cohen* (1881), 45 L. T. N. S. 589.

Although not stated in express terms, one object of the defendants Altha Ann Brown and John W. Baker in making their offer of the 26th August was, I find, to procure the stifling of the prosecution of the charge made against W. E. Brown; and I find also that the offer so made was accepted by the plaintiff and the other creditors of the firm of W. E. Brown & Co., and, in accordance with the concluded agreement formed by such acceptance, no evidence was offered on the charge pending against W. E. Brown, and the charge was consequently dismissed. And the notes sued upon, having been given on the illegal agreement thus entered into, cannot be enforced.

The other cause of action in the statement of claim in respect of which the plaintiff sues, not only on his own behalf, but also on behalf of all the other creditors of the defendant Altha Ann Brown, is to set aside as fraudulent and void the transfer by the defendant Altha Ann Brown to her co-defendant William E. Brown of the notes made by W. J. Saunders and George H. Saunders received by her and referred to in the fourth paragraph of the offer of Altha Ann Brown and John W. Baker.

The foundation of the claim of the plaintiff as a creditor of Altha Ann Brown is on the notes given by her and John W. Baker under the illegal agreement. The claims of the other alleged creditors of Altha Ann Brown are likewise on notes given by her in accordance with the same agreement. And, as part of the consideration for the alleged

agreement is illegal, the whole is bad : *Lound v. Grimwade* Judgment. (1888), 39 Ch. D. at p. 613 ; and see the cases there referred to, of *Featherston v. Hutchinson* (1590), Cro. Eliz. 199 ; *Waite v. Jones* (1835), 1 Bing. N. C. 656, 662 ; *Shackell v. Rosier* (1836), 2 Bing. N. C. 634. MacMahon,
J.

There will be judgment for the defendants Altha Ann Brown and John Walton Baker in respect of the cause of action on the three promissory notes mentioned in the 8th paragraph of the statement of claim.

As to the other causes of action in the statement of claim, as they are connected with the illegal agreement, there will be judgment for the defendants dismissing such causes of action, but without prejudice to the right of the plaintiff, or any other creditors of the said Altha Ann Brown, to enforce any claim or cause of action against the defendants, or any of them, which can be dissociated from such illegal agreement.

In dismissing the action I will follow the course pursued by Stirling, J., in *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351, and dismiss it as against all the defendants without costs.

E. B. B.

[DIVISIONAL COURT.]

CROSS V. CLEARY ET AL.

Contract—Specific Performance—Agreement to Bequeath Estate—Remuneration for Maintenance—Implied Promise—Annual Payments—Arrears—Statute of Limitations.

The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons:—

Held, that, apart from the Statute of Frauds, the evidence was not such as the Court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it.

Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears.

Statement. THIS was an action brought by a widow named Cross against the executors of the will of one Karl Huebner, deceased, for specific performance of an alleged contract made in 1888 between the plaintiff and the deceased, whereby, in consideration of the plaintiff promising to board, lodge, and care for the deceased during the remainder of his life, the deceased promised to give her all his property at his death. The plaintiff alleged that she had performed the agreement on her part, but that the deceased had left her nothing by his will. She claimed, in the alternative, payment, upon a *quantum meruit* for the maintenance, etc., of the deceased for eight years.

BOYD, C., before whom the action was tried at Sandwich, dismissed the claim for specific performance, but

gave judgment for the plaintiff for \$2,000 for six years' maintenance, etc., of the deceased. Statement.

The plaintiff appealed from this judgment, upon the ground that she was entitled to a decree for specific performance, or, if not, to a larger sum than \$2,000.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE and STREET, JJ., on the 10th June, 1898.

W. R. Riddell, for the plaintiff, contended that she was entitled to specific performance, citing *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Fenton v. Emblers* (1762), 3 Burr. 1278; *Ridley v. Ridley* (1865), 34 Beav. 478; *Walker v. Boughner* (1889), 18 O. R. 448; *Smith v. McGugan* (1892), 21 A. R. 542, 21 S. C. R. 263; *Bell v. Hewitt* (1865), 24 Ind. 280; *Izard v. Middleton* (1785), 1 Dess. Eq. (S. C.) 116; *Jilson v. Gilbert* (1870), 26 Wis. 637; *Bash v. Bash* (1848), 9 Pa. St. 260; *Hudson v. Hudson* (1891), 87 Ga. 678; *Frost v. Tarr* (1876), 53 Ind. 390; *Wallace v. Long* (1885), 105 Ind. 522; Reed on the Statute of Frauds, vol. 2, secs. 622-3; Sutherland on Damages, vol. 2, p. 453. If the plaintiff be driven to a *quantum meruit*, she is entitled to an eight years' allowance, for the Statute of Limitations did not begin to run until the death of Huebner in 1896: *Jilson v. Gilbert* (1870), 26 Wis. at p. 645; *Bash v. Bash* (1848), 9 Pa. St. 260; *Flower v. Cruikshank* (1889), 77 Iowa 110; *Patterson v. Patterson* (1816), 13 Johns. (N. Y.) 379; *Quackenbush v. Ehle* (1849), 5 Barb. (N. Y.) 469; *Jacobson v. Le Grange* (1808), 3 Johns. (N. Y.) 199; *Robinson v. Raynor* (1864), 28 N. Y. 494; *Cowper v. Godmond* (1833), 9 Bing. 748; *Huggins v. Coates* (1843), 5 Q. B. 432.

Aylesworth, Q.C., for the defendants, contended that the plaintiff could not succeed in the face of the Statute of Frauds, citing *Turner v. Prevost* (1890), 17 S. C. R. 283; and the Court would not decree specific performance of such a contract as was alleged. The allowance of \$2,000 made by the Chancellor was too large even for eight years.

Riddell, in reply, cited *Williams v. Leonard* (1895), 16 P. R. 544, 17 P. R. 73, 26 S. C. R. 406.

Judgment. August 5, 1898. STREET, J.:—

Street, J.

The plaintiff in this action seeks to recover some \$7,000 worth of personalty and \$3,000 worth of realty, upon the strength of a verbal agreement which she alleges was made by the deceased Huebner, some eight years before his death, with her. She states that the agreement was made as follows: "I said to him one day, 'I have no more use for you, and you have to look for another home,' and he cries and says, 'That is too bad; I have been here so many years, and now that I am an old man you send me off;,' and he was crying, and I said, 'Well, Karl, of course, I can't afford to pay you no more wages.' He said, 'You give me a home as long as I live and when I die you have what is left.' 'Well,' I said, 'all right, Karl.' He said, 'That is an agreement, and here is Mrs. Herne and Mr. Herne.'" The same story is repeated in almost the same language by Mrs. Herne, the plaintiff's daughter, and by George Herne, the plaintiff's son-in-law. Besides this, there is the evidence of two or three other persons to whom the deceased is sworn to have said that he had agreed to leave the plaintiff his property when he died.

Huebner was an ignorant and penurious old man, very dirty in his habits; he continued to live with the plaintiff during the eight remaining years of his life, excepting during short periods when he was in hospital, and he finally committed suicide by hanging himself. He left a will and appointed the defendants his executors, but did not give his property to the plaintiff.

In my opinion, entirely apart from the Statute of Frauds, this is not such evidence as we could act upon in such a matter. It is to be remembered always in cases of this nature that what is asked is that we should substitute the evidence offered of an agreement to make a will in a particular manner for the will itself. In the present case we are asked to decree that the undoubted will of the deceased, duly executed under the statute, and admitted to probate without objection from the plaintiff or any one

else, is, in fact, deprived of all effect, as the result of a conversation said to have taken place eight years before the testator's death, in the presence of the plaintiff, her daughter, and her son-in-law. In my opinion, such an agreement as that set up by the plaintiff must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it. There may possibly be cases in which the absence of written evidence of the whole terms and consideration for such an agreement might be pardoned, but I cannot at present imagine such a case, and I should be sorry, for my own part, ever to find myself constrained to act upon the mere recollection of any number of witnesses, unsupported by a complete written record of an agreement which is to take the place of a will.

Judgment.

Street, J.

I agree, however, with the conclusion at which the Chancellor arrived, that the plaintiff is entitled under the circumstances to remuneration as upon a *quantum meruit* for the board, lodging, and care of the deceased for six years before the action, and I think the allowance he has made under this head is so liberal as to have been sufficient to cover and recompense the plaintiff for the whole period of eight years claimed for, after making due allowance for the work done by the deceased during the first six years of the period. I do not, however, feel inclined, under all the circumstances, to reduce the amount, although I am of opinion that the contract we are giving effect to, being an implied promise to pay a reasonable sum per annum, and not a special promise to pay at death, does not give the plaintiff a right to recover more than six years' arrears.

In my opinion, the appeal of the plaintiff should be dismissed, with costs to be deducted from the amount found due her.

FALCONBRIDGE, J.:—

I agree in the result.

E. B. B.

RE MATHIEU.

Parent and Child—Custody of Infant—Rights of Father—Discretion of Court.

Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the Court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the Court over the custody of infants, by R. S. O. ch. 168, sec. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.

In re Agar-Ellis (1878), 10 Ch. D. 49, 71, and *In re Newton*, [1896] 1 Ch. 740, specially referred to.

And where a wife, without any other reason than that she was tired of living in the country to which her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the Court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times.

Statement. THIS was an appeal by Jean Antoine Mathieu, the father of Marie Mathieu, a child of five years, from an order made on the 4th May, 1898, by the Judge of the Surrogate Court of the county of Essex, ordering that the custody of the infant should be given to her mother, Josephine Mathieu, the wife of the appellant, and directing that the appellant should have access to the infant for two hours on one day of each week, at the residence of the mother. The order was made upon the petition of the wife, there being a cross-petition by the husband. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE and STREET, JJ., on the 6th June, 1898.

F. C. Cooke, for the appellant. The father has the common law right to the custody of his child, and that right will not be taken away where there has been no breach of marital duty to deprive him of his paternal right. In this case the wife charges her husband with cruelty, but

there is no evidence of that. In fact, she tired of Florida, where her husband had made his home, and left him voluntarily. The father is well able to support the child. I refer to *Smart v. Smart*, [1892] A. C. 425, 434; *Re Carswell* (1875), 6 P. R. 240; *In re Agar-Ellis* (1878), 10 Ch. D. 49. Statement.

A. D. Crooks, for the mother. There are allegations and counter-allegations by the parents; but the interests of the child must be looked at. The custody will be given to the parent who is able to take care of the child, and that, in the case of a girl of five, is the mother. I refer to *Re Scott* (1879), 8 P. R. 58; *Re Murdoch* (1882), 9 P. R. 132; *Re Dickson* (1888), 12 P. R. 659.

July 20, 1898. STREET, J.:—

The father and mother of the infant were married at Detroit on the 20th February, 1892. At the time of the marriage the father was supposed to be worth \$50,000 or \$60,000, and the mother was a book-keeper in his office. He was then nearly fifty years of age, and she was under twenty-five. He settled upon her before her marriage some property valued at \$10,000, which was subject to a mortgage for \$4,500. A month after the marriage the father became involved, and lost the greater part of his property. He moved to Chicago with his wife, and their only child, the infant in question, was born there on the 21st November, 1892.

In January, 1895, they moved to the State of Florida, where the father had purchased a piece of property, upon which he began to carry on a fruit farm, and there they lived until the 18th February, 1898, when the mother left her husband, taking the infant with her. She left him without any notice, without any quarrel or ill-treatment, and, so far as I can judge from the evidence, without any other reason than that she was tired of living in the country to which he had taken her. She made her way with the child to Chicago and thence to Windsor, where she has since been living with her mother.

Judgment.
Street, J.

Early in May, 1898, cross-applications were made to the Judge of the Surrogate Court of the county of Essex by the father and mother for the custody of the child. Upon these applications an affidavit was filed by the mother containing stories of ill-treatment as her excuse for leaving her husband. She has been cross-examined upon this affidavit, and I think it is not putting it too strongly to say that these stories have been shewn to have been without any solid foundation whatever. After moving away from him with the child she wrote him, on her way to Windsor, a post card and a letter of the most friendly nature, explaining that she had left him in order that she might get away from the backwoods and "live once more in the world," addressed him as "dear papa," and signed herself "affectionately, Josephine."

The learned Judge before whom the applications came delivered no written judgment, but the solicitor for the mother was present when he delivered his oral judgment, and has set forth in an affidavit the reasons given, as to which there seems no controversy. The reasons are as follows: "He stated in said judgment that he was not going to touch particularly upon whether the said Josephine B. Mathieu was or was not justified in leaving her husband, Jean A. Mathieu, but that he might say that when she was married to him she doubtless supposed him to be a man of means and wealth, and that she would not be called upon to undergo what she considered the privations complained of by her. He further stated that he thought as between the father and mother of the infant there was, upon the whole material, an equality of circumstances. He further stated that he would not call in question Mr. Mathieu's conduct and would exonerate him from the charges made against him, but at the same time would say that there was no charge against Mrs. Mathieu, who was a woman of excellent reputation and standing. He further stated that, as all things appeared to him to seem equal between the father and the mother, he must consider the child in the matter, and that he would find and did

find that the child would be better under the care of the mother, Josephine B. Mathieu, than of the father, Jean A. Mathieu. He further said that he considered he had a discretionary power in the matter which he had a right to exercise for the welfare of the child, and considering that it was more for her interest he would give her custody to her mother. He said it appeared that the father was not in a position, having no employment or apparent means, to suitably take care of the child, while, on the other hand, the mother had a comfortable home at the residence of her mother, Mrs. Barillier, in Windsor, for herself and the child. He said furthermore that, considering the youth of the child, she would require the watchful and tender care of her mother."

Judgment.

Street, J.

In my opinion, the conclusion at which the learned Judge arrived cannot be upheld without disregarding the principles laid down in a long succession of authorities in our own Courts as well as in England. Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his child merely because the wife prefers to live away from him and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. There is no reason here, apart from the mere caprice of the wife, why the child should not have the advantage of living with both her father and mother; to do so would be far better for her than to live with either the father or mother alone, and it must be the aim of the Court not to lay down a rule which will encourage the separation of parents, who ought to live together and jointly take care of their children. The object and scope of the modern Acts of Parliament* which have given to the Courts so wide a discretion over the custody of infants have been declared in a succession of decisions, some of which I have mentioned below, and that discretion must

* See R. S. O. ch. 168, sec. 1.

Judgment.

Street, J.

be exercised in accordance with the principles which they have established. It is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit. The positions of a husband and his wife were not intended to be reversed by the change in the law; it was not the object of it that the Court should be brought in at the instance of the wife to decide whether the husband had made the wisest choice as to his place of abode and to punish him by taking away his child from him and giving it to his wife, if it thought he had not. He still has the right to say, within reasonable bounds, where he and his family shall live, and if his wife chooses to live in another place she must leave her children behind her: *In re Taylor* (1840), 11 Sim. 178; *In re Fynn* (1848), 2 DeG. & Sm. 457, 474; *Curtis v. Curtis* (1859), 5 Jur. N. S. 1147; *In re Davis* (1871), 3 Ch. Chamb. R. 277; *In re Taylor* (1876), 4 Ch. D. 157; *In re Murdoch* (1882), 9 P. R. 132; *In re Elderton* (1883), 25 Ch. D. 220; *In re Agar-Ellis* (1878), 10 Ch. D. 49; *In re Newton*, [1896] 1 Ch. 740.

In the last mentioned case the Court of Appeal refer with approval to the law as laid down by James, L. J., in *Re Agar-Ellis* (1878), 10 Ch. D. at p. 71, in the following terms: "The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the

absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with."

Judgment.

Street, J.

The appeal should be allowed with costs and an order should be made giving the custody of the infant to her father, Jean Antoine Mathieu.

FALCONBRIDGE, J. :—

I agree. Our order will contain a provision allowing the mother to have access to the child at reasonable times.

E. B. B.

[DIVISIONAL COURT.]

DONALDSON V. WHERRY ET AL.

County Court—Order in Term—Reversal of Verdict—Jurisdiction—Rule 615—Appeal to High Court—R. S. O. ch. 55, sec. 51—Landlord and Tenant—Co-tenants—Release of One—Agreement—Consideration.

In a County Court action tried with a jury, a verdict was found for the defendant and judgment in his favour ordered by the trial Judge. Upon motion by the plaintiff to set aside the verdict and judgment and to enter judgment for the plaintiff or for a new trial, the County Court, in Term, made an order setting aside the verdict and judgment and ordering judgment to be entered for the plaintiff:—

Held, that, under the provisions of sec. 51 of the County Courts Act, R. S. O. ch. 55, an appeal by the defendant from the order of the County Court, in Term, lay to a Divisional Court of the High Court. The County Court Judge, in Term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute.

In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge.

Statement. THIS was an appeal by the defendant Wherry from an order made by the senior Judge of the County Court of the county of York, in Term, setting aside the verdict of the jury and the judgment entered by the junior Judge thereon, at the trial, in favour of the defendant Wherry, and ordering that judgment be entered for the plaintiff against the defendant Wherry for \$89.71, with interest from the 1st April, 1894, and costs.

The action was brought in the County Court against two defendants, Wherry and Cox, to recover an amount alleged to be due to the plaintiff for rent of certain lands, under the circumstances set forth in the judgment.

At the trial, on the 21st December, 1897, before the junior Judge and a jury, a verdict was rendered in favour of the defendant Wherry, and the action dismissed, as against him, with costs. The plaintiff moved, in January, 1898, before the senior Judge, in Court, to set aside the verdict and judgment for the defendant Wherry, and to

enter judgment for the plaintiff, or for a new trial, upon the ground that there was no evidence to support the defence set up, and that the plaintiff upon the law and evidence was clearly entitled to succeed. After the argument of this motion an order was pronounced setting aside the verdict for the defendant Wherry, and ordering judgment to be entered against him for the amount of the plaintiff's claim with costs. Statement.

The defendant Wherry appealed against this order, and his appeal came on for hearing before a Divisional Court composed of FALCONBRIDGE and STREET, JJ., on the 7th July, 1898.

W. C. McKay, for the plaintiff, took the objection that the appeal did not lie, under sec. 51 of the County Courts Act, R. S. O. ch. 55, citing *Weaver v. Sawyer* (1889), 16 A. R. at p. 427; *Brown v. Carpenter* (1896), 27 O. R. 412.

Mulvey, for the defendant Wherry.

Cur. adv. vult.

June 8, 1898. The Court announced that the appeal would be heard subject to the objection.

The appeal was heard on the merits by the same Court on the 10th June, 1898.

Mulvey, for the defendant Wherry, cited *Parsons on Partnership*, p. 415; *Hart v. Alexander* (1837), 2 M. & W. 484; *Taylor on Evidence*, secs. 804-816; *Fairlie v. Denton* (1828), 3 C. & P. 103; *Storey on Partnership*, 7th ed., sec. 158.

W. C. McKay, for the plaintiff, referred to *Bresse v. Griffith* (1894), 24 O. R. 492; *Lindley on Partnership*, Bl. ed., pp. 240, 243; *Ray v. Isbister* (1894-6), 24 O. R. 497, 22 A. R. 12, 26 S. C. R. 79; *Gurney v. Braden* (1895), 3 Brit. Col. L. R. 474; *Davison v. Donaldson* (1882), 9 Q. B. D. 623.

Judgment. July 30, 1898. STREET, J.:—

Street, J.

A preliminary objection to the hearing of the appeal was raised by the plaintiff. He contended that there was no right of appeal given to the defendant in a case like the present by sec. 51 of ch. 55, R. S. O., the clause regulating appeals to the Divisional Court after a trial in the County Court. I think the appeal is clearly given by sub-sec. (1) of that section: "Any party to a cause or matter in a County Court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the County Court to be entered at or after the trial * * in any case tried with a jury, to which sub-section (4) does not apply."

Sub-section (4) provides that "where there has been a trial with a jury any motion for a new trial, whether made for that relief alone or combined with, or as an alternative for any other relief, shall be made to the County Court."

The defendant Wherry is given a right of appeal under sub-sec. (1) from the judgment which the County Court Judge has directed to be entered, and it is not taken away by sub-sec. (4), because this is not an application for a new trial. All that sub-sec. (4) says is that the plaintiff could not have applied for a new trial to the Divisional Court after the judgment directed by His Honour Judge Morgan to be entered upon the verdict, but must have made that application to the County Court, as he in fact did.

Therefore, I think the objection to the hearing of the appeal must be overruled and that the appeal must be decided upon its merits.

Upon the merits I entirely concur in the judgment appealed from. The defendants were tenants to the plaintiff under a lease under seal which expired the 1st April, 1894. In January, 1894, the rent was in arrear, and the plaintiff, who was anxious to have his rent paid, met the two defendants at St. Catharines.

Cox lived on the place. Wherry was his brother-in-law and was a marble cutter in St. Catharines; he became a party to the lease apparently only because Cox had no means at the time they took it, but, having become a party to the lease, he was in partnership with Cox in working the demised premises. The lessees had disagreed as to the accounts between them, and they swore that they met the plaintiff to determine which of them should take the place and pay the debts, including the rent. The result as between themselves of the meeting was that Cox undertook to pay the plaintiff. The possession of the place continued as before after the meeting, and Cox paid \$130 out of \$132.50 which became due on the 1st April, 1894. The defendants swore that they agreed between themselves that Cox only was the tenant after the meeting in January, and that they discussed the whole arrangement in Donaldson's presence; but neither defendant would say that Donaldson ever agreed to take Cox for the balance of the rent then overdue, or for that to come due. They appear to have supposed that, because Donaldson heard the arrangement they came to as between themselves, that Cox should pay the rent overdue and accruing, therefore, the arrangement bound him to look to Cox alone, and the jury seem to have adopted this view. But I fully agree with the learned Judge of the County Court whose judgment is appealed from that it requires more than this to put an end to a sealed contract for a tenancy and to discharge a debtor from a debt which he admittedly owed. There must be a consideration and an agreement to discharge it, and the evidence fails to disclose either of these essentials: Taylor on Evidence, secs. 813 and 814; *Davison v. Donaldson* (1882), 9 Q. B. D. 623.

Judgment.
Street, J.

Cox continued alone as tenant after the expiration of the lease, under a verbal tenancy, at a different rental, until the 14th April, 1897, when a new lease under seal was made by the plaintiff to the wife of Cox. In this lease the plaintiff, for the consideration of \$200, released the defendant

Judgment. Cox from all sums then due for rent, but expressly reserved his rights against Wherry for any portion of it. This it is clear did not discharge Wherry from liability. By the arrangement between him and Cox in January, 1894, he became a surety to the plaintiff for the payment of the rent, and it is well settled that a discharge of the debtor with a reservation of remedies against the surety operates merely as a covenant not to sue, and does not operate as a release of the surety: *North v. Wakefield* (1849), 13 Q. B. 536; *Green v. Wynn* (1869), L. R. 4 Ch. 204.

Street, J.

In my opinion, the conclusion reached by the judgment appealed from is the only one which could properly be reached upon the evidence at the trial, and under Rule 615 the learned Judge appealed from had jurisdiction to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary for finally determining the questions in dispute. In my opinion, the appeal should be dismissed with costs.

FALCONBRIDGE, J.:—

I agree. As the plaintiff gets all the costs of the appeal, there will be no special order as to the costs of the day of the 8th June.

E. B. B.

[DIVISIONAL COURT.]

CLARK V. KEEFER.

Trusts and Trustees—Power Coupled with Trust—Discretion of Trustees—Liability for Breach.

Where a power is coupled with a trust or duty, the Court will enforce the proper exercise of the power, although it will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it.

Lands were devised to trustees upon trust, in their discretion to sell, as soon as they might deem it proper to do so, for the most money that could reasonably be obtained therefor; and by a later clause, it was declared that the trustees were not to be answerable for the exercise or non-exercise of the powers therein contained, or as to the manner or exercise thereof, but were to have an absolute discretion as to the same:—

Held, that the power of sale was coupled with a trust to sell for the most money, and that the trustees were answerable for a proper exercise of the power, the powers of the Court being in no way affected by the clause exonerating the trustees, which related merely to the time and manner of exercising the trust.

THIS was an action tried before FALCONBRIDGE, J., with- Statement.
out a jury, at Ottawa, on the 17th January, 1898.

The action was brought by beneficiaries under the will of Thomas MacKay the younger, who died on or about the 11th of November, A.D. 1865, against the defendant Thomas C. Keefer, the sole surviving executor and devisee in trust under said will, and other defendants, being beneficiaries in the same interest with the plaintiffs, praying that the said Thomas C. Keefer might be ordered to account for the loss which the estate of the said Thomas MacKay the younger had suffered by reason of a breach of trust in the statement of claim set out.

Thomas MacKay the younger by his will devised "all and every the freehold lands, tenements, hereditaments and premises of or to which I am, or at my decease shall be, seized or entitled at law or in equity, or which I have or at my death shall have power to dispose of by will unto and to the use of Thomas C. Keefer," etc., "their heirs and assigns upon trust that they my said trustees or the survivor of them or the heirs and assigns of

.Statement. such survivor do and shall as soon as in their discretion it is proper so to do after my decease absolutely sell and dispose of the said freehold," etc., "for the most money that can be reasonably obtained for the same," etc.

By subsequent clauses of the will various powers were given to the trustees; and a still later clause of the will was as follows: "My trustees or trustee shall not be answerable in any court of equity for the exercise or non-exercise of the powers herein contained or any of them or as to the manner or exercise thereof; but that the said trustees or trustee shall have an absolute discretion as to the same."

The breach of trust complained of by the plaintiffs was that the said Thomas C. Keefer had sold a certain parcel of land belonging to the testator known as the Cemetery Reserve, worth, it was alleged, \$50,000, and containing about ten acres, to the Beechwood Cemetery Company, Limited, for the price or sum of \$1,500; and paragraph 15 of the statement of claim alleged: "that by the sale so made as aforesaid the said Thomas C. Keefer committed a breach and violation of his trust under the said will, inasmuch as the price obtained from the said Beechwood Cemetery Company, Limited, for the said land, to wit \$1,500 was not 'the most money that could reasonably be obtained for the same,' as required by the provisions of the said will, but was a grossly inadequate price and consideration therefor, being less than one-thirtieth part of the value of the said land, which fact the said Thomas C. Keefer well knew, or should or might have known, if he had taken the steps, which it was his duty to take as trustee, to ascertain the value of the said lands, before sale thereof; whereby, and by reason whereof, the plaintiffs and other beneficiaries of the said estate were made to suffer, and have in fact suffered great loss and injury."

The defendant Thomas C. Keefer by his statement of defence denied the allegations regarding the sale at an undervalue, and brought into Court the plaintiffs' share of the \$1,500 purchase money, but did not plead that he was

relieved by reason of the provisions in the will that he should not be answerable in any court of equity or otherwise for the exercise or non-exercise of the powers given to him or as to the manner of the exercise thereof or that the trustees had an absolute discretion as to the same. Statement.

On the opening of the case *Hogg*, Q.C., for the plaintiffs, put in as evidence a copy of the probate of the will of Thomas MacKay the younger.

McCarthy, Q.C., for the defendant, set up that under the provisions of the will the defendant Thomas C. Keefer having uncontrolled discretion as to the manner of dealing with the estate the plaintiffs were not entitled to proceed, as they had not alleged in their pleading *mala fides* on the part of the defendant Thomas C. Keefer, and relied upon the case of *Gisborne v. Gisborne* (1877), 2 App. Cas., p. 300, in support of his contention.

After argument the learned trial Judge delivered the following judgment: "The point is here, the plaintiffs not having charged bad faith, whether they can shew that the trustee acted without consideration. I do not see how the plaintiffs can go on with this record. It appears to me under the authorities Mr. McCarthy has cited the plaintiffs have no case at all. But, apart from that, if the English language has any meaning at all it means what the defendant contends. I do not see any force in the argument that the testator cannot leave an uncontrolled and uncontrollable discretion to his trustees. He could have given his property to the trustee if he had liked.

"I think the case must be dismissed with costs."

A motion was made to the Divisional Court on behalf of the plaintiffs to set aside the judgment entered at the trial, and for an order that a new trial be had between the parties, on the ground that the learned trial Judge was in error in holding that the words of the said will giving absolute discretion to the trustee were a bar to the plaintiffs' right of action for a breach of trust.

Argument.

On March 17th, 1898, before a Divisional Court composed of BOYD, C., and FERGUSON, J., *G. G. S. Lindsey* supported the motion. There is no demurrer or its equivalent in the defendant's pleading. The absolute discretion is as to the powers contained in the will, and that has reference to the various powers set out from time to time in the will. The first disposition by the testator is a trust for sale. There is a clear difference between a power and a power coupled with a trust: Lewin on Trusts, 8th ed., p. 451. *Gisborne v. Gisborne* (1877), 2 App. Cas. 300, is a case of a power only and uncontrolled discretion as to it is given. *Tempest v. Lord Camoys* (1882), 21 Ch. D. 572, distinguishes between a power, and a trust or duty coupled with a power, in which latter case the Court will compel the trustees to carry it out in a proper manner and within a reasonable time. This case is followed in *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324. Underhill on Trusts, 4th ed., p. 420. lays it down that where absolute discretion has been given to the trustees to do a particular act (*e. g.*, to sell trust property) the Court cannot compel them to exercise the power; but if they do exercise it the Court will see that they do not exercise it improperly or unreasonably. See also *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. N. S. 752. Smallness of price may in itself be evidence of fraud: *Warner v. Jacob* (1882), 20 Ch. D. 220.

Osler, Q.C., contra. There is no charge of want of good faith, and the defendant brings into Court plaintiffs' share of the proceeds of the sale. The simple point is that where no wrong is charged, and the trustee acts in good faith, can he be made chargeable in the face of the express declaration in the will that he is not to be answerable. The cases clearly shew that he cannot, and therefore the action was properly dismissed at the trial: *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Walker v. Walker* (1820), 5 Madd. 424; *Re Beloved Wilkes Charity* (1851), 3 McN. & G. 440; *Tabor v. Brooks* (1878), 10 Ch. D. 273, 278; Chitty's Equity Dig., p. 6942. No amendment should

be allowed now : *Hipgrave v. Case* (1885), 28 Ch. D. 356; *Argument. Cropper v. Smith* (1883), 24 Ch. D. 305.

Delamere, Q.C., who was present on behalf of Grace Delamere took no part in the argument.

Lindsey, in reply.

April 25th, 1898. BOYD, C. :—

The rule of the Court is that when a power is coupled with a trust or duty the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it: *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571, as applied and followed in *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. N. S. 752. *Gisborne v. Gisborne* (1877), 2 App. Cas. 300, cited for the defendants was a case of power only in which the trustees had uncontrolled authority to apply the whole or any part of the income as they might think fit.

In the expressions of the present will, the testator distinguishes between a power and a trust. The first provision of the will is to devise the lands in question to the trustees upon trust to sell "for the most money that can be reasonably obtained for the same." The later clause that the trustees "shall not be answerable in any Court for the exercise or non-exercise of the powers herein contained or as to the manner of the exercise thereof" (these things being left to his absolute discretion), does not interfere with their observance of the direction that the sale of the land (when made), shall be for the most money that can reasonably be obtained.

The first provision as to sale is very different from a power; it is a trust for sale which is imperative for the purpose of distribution; and by the legal effect of it the nature of the estate is changed so that the beneficiaries are entitled to the proceeds and not the land itself: *Biggs v. Peacock* (1882), 22 Ch. D. 284, 286. The mere power is optional with the trustee; here his duty as to conversion

Judgment. is prescribed and he is not exempt from liability in case he makes an improvident sale.
Boyd, C.

The complaint in the pleadings is that land worth \$50,000 was sold for \$1,500. This is so great a disproportion as (if true and well proved) to shew a violation of the trust. On the pleadings there is a cause of action which does not appear to be displaced by the clause in the will as to the unfettered discretion of the trustees in the exercise or non-exercise or manner of exercise of the powers therein given.

The judgment should be set aside and the case sent down to be tried out in the usual way. Costs of former trial and appeal to be costs in the cause to the plaintiffs.

FERGUSON, J. :—

The true construction of the clause of the will, which is set forth in the statement of claim is, as I think, that the power given is coupled with a trust and duty, the duty being to sell the land for the most money that could reasonably be obtained for the same, the purchase money to be deemed part of the personal estate of the testator bequeathed by the will. The respective interests in the purchase money is not in dispute here but are admitted.

In the 8th ed. of Lewin on Trusts, p. 613, it is said, where a power is given to trustees to do or not to do a particular thing at their discretion the Court has no jurisdiction to lay a command or prohibition on the trustees as to the exercise of that power, provided their conduct be *bona fide* and their determination is not influenced by improper motives. But where the power is accompanied with a duty and meant to be exercised the Court will compel the execution, or execute it in the place of the trustees. So where the trustees had a power of sale if they should consider it advisable but not otherwise, it was held that the power though discretionary in form was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise

of the power they were bound to exercise it: see *Nickisson v. Cockill* (1863), 3 DeG. J. & S. 622. Judgment:
Ferguson, J.

In the case *Tempest v. Lord Camoys* (1882), 21 Ch. D. 572, a paragraph of the head note is: Where a power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.

The same proposition is stated in the case *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. N. S. 752.

The same doctrine is asserted the case *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324, 42 W. R. 183, where the cases *Wilson v. Turner* (1883), 22 Ch. D. 521, and the case *Tempest v. Lord Camoys*, are discussed and explained.

The case *Gisborne v. Gisborne* (1877), 2 App. Cas. 300, 302, was one in which the trustees were given an absolute discretion and uncontrollable authority and the power given them was not connected to or coupled with a trust or duty so far as I can see. The same was the case in *Tabor v. Brooks* (1878), 10 Ch. D. 273.

The case of *Re Hodges, Dorey v. Ward* (1878), 7 Ch. D. 754, may also be looked at on the subject.

The general rule seems to be that the Court will not interfere with the discretion of trustees where it is fairly and honestly exercised: see *Costabadie v. Costabadie* (1847), 6 Hare 410, and in *Re Beloved Wilkes Charity* (1851), 3 McN. & G. 440. But where the power given the trustees even though absolute in form is coupled with a trust or duty the rule is different and as stated in *Tempest v. Lord Camoys* above.

In the present case the power given to the trustees seems to me to plainly coupled with a trust and duty. The principle seems to be that although the Court cannot interfere when the trustees are given an absolute power and they act *bonâ fide*, yet where such power is coupled with a trust or duty the Court will in a proper case see that the trust is executed or the duty performed.

I do not see that the declaration contained in the same

Judgment. will that the trustees should not be answerable in any
Ferguson, J. Court of equity or otherwise for the exercise or non-exercise of the powers given them or any of them, or as to the manner of the exercise thereof, but that the trustees should have an absolute discretion as to the same differs the case.

It is stated that the trustee sold the land in question for one-thirtieth part of its value, contrary to his duty. One does not know, of course, what the fact is in this respect.

I am of the opinion that the statement of claim shews a good cause of action and one that should be entertained. I think the evidence should have been heard and the cause tried.

The action should I think now be sent for a new trial, or for a trial, and I think the costs of the former trial and of this appeal should be costs in the cause to the plaintiffs in any event.

G. F. H.

[DIVISIONAL COURT.]

RE RENFREW.

Revenue—Succession Duty—Property in Another Province—Testator's Domicil—Surrogate Courts—Jurisdiction.

The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal.

Where a deceased person had his domicil, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under \$100,000, although his whole estate, including property in the Province of his domicil, exceeds \$100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty. Judgment of the Judge of the Surrogate Court of York affirmed.

THIS was an appeal from the decision of the Judge of **Statement.** the Surrogate Court of the county of York. The facts necessary for the decision of the case were, shortly stated, as follows :

George Richard Renfrew died on the 4th September, 1897, leaving a will by which he devised the whole of his property, wherever situate, to his widow and children. At the time of his death he was domiciled in the Province of Quebec. He had property both in that Province and in the Province of Ontario at the time of his death, amounting in the aggregate, after payment of his debts, to over \$100,000, but his property in the Province of Ontario did not exceed \$67,000, or thereabouts, in value.

Upon these facts the treasury department for the Province of Ontario asserted that the Government was entitled to succession duty at the rate of \$2.50 *per* \$100 upon the property situate within this Province, and applied to the Judge of the Surrogate Court of the county of York, where the property was situate, to require from the executors upon the grant of probate to them a bond under sec. 5 of the Succession Duty Act, R. S. O. ch. 24, for the payment of the duty.

The Judge decided that he had jurisdiction to determine

Statement. in every case (subject to the appeal given by the Act) whether succession duty was or was not payable, and he decided and declared in the present case that no succession duty was payable.

From this decision the Treasurer of the Province of Ontario appealed to a Divisional Court of the High Court, and the questions raised upon the appeal were :—

1st. Whether the Judge of the Surrogate Court had power to determine whether succession duty was or was not payable, and to make a decision binding both parties upon the point (subject to appeal); and

2nd. Whether, under the circumstances here existing, succession duty was payable to the Treasurer of Ontario upon the portion of the estate of the deceased within this Province.

The appeal was heard on the 9th and 10th June, 1898, before FALCONBRIDGE and STREET, JJ.

Aylesworth, Q. C., for the Treasurer of Ontario.

D. T. Symons, for the executors.

August 22, 1898. The judgment of the Court was delivered by

STREET, J. :—

I am of opinion that this appeal cannot be supported in either branch.

Under the 5th section of R. S. O. ch. 24, wherever an estate is liable to succession duty, the executor or administrator is required, before obtaining probate or letters of administration, to file with the Registrar of the Surrogate Court to which the application has been made, a bond with two sureties for the payment of the duty. The decision as to whether this bond is or is not required to be given, necessarily involves in each case the previous determination as to whether the estate is liable to succession duty; and, under the 18th section of R. S. O. ch. 59, the Surrogate Court has

jurisdiction to determine all matters relative to the granting of probate and letters of administration. As the giving of a succession duty bond is, in cases within the Act, a necessary preliminary to the grant of probate or letters of administration, it seems clear that the inquiry whether the case falls within the Act is a "matter relative to the granting of probate," etc. By sec. 36 of the same Act, an appeal to a Divisional Court is given to any person considering himself aggrieved by any order, sentence, or judgment of a Surrogate Court.

Judgment.
Street, J.

There is nothing in the Succession Duty Act itself to lead to the belief that this jurisdiction was not intended to be exercised by the Surrogate Courts; on the contrary, the 9th section gives to the Judge of the Surrogate Court express jurisdiction, upon appeals to him against the appraisement or assessment of the property of an estate, to determine all questions of the liability of the appraised estate and any part thereof to duty, subject to the appeal from him provided in that section. The 18th section of the same Act also appears to confer upon him in other cases a jurisdiction necessarily involving the same class of questions.

We have, therefore, a tribunal expressly treated as having jurisdiction, under some circumstances, to determine both the existence and the amount of the liability for succession duty. I can see no good reason for withholding from it the power of determining either or both of those questions finally between the parties, subject to appeal, whenever they are properly raised before it, and I think, therefore, that the decision of the Judge of the Surrogate Court of York, in the present case, that this estate was not subject to succession duty, was within his powers.

Upon the main question of the liability of the portion of the estate within this Province to pay the duty, I am of opinion that the Judge of the Court below rightly held that no such liability existed.

The clauses of the Succession Duty Act relied on by the appellant as imposing the duty are as follows :—

Judgment.

Street, J.

Section 3. "This Act shall not apply :

Sub-section 3. "To property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000 in value."

Section 4. "Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided, etc. :—

"(a) All property situate within this Province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy."

Sub-section (3). "Where the aggregate value of the property of the deceased exceeds \$100,000, and passes in manner aforesaid, either in whole or in part, to or for the benefit of the father, mother, husband, wife, child, grandchild, or other lineal descendant or daughter-in-law or son-in-law of the deceased, the same or so much thereof as so passes (as the case may be) shall be subject to a duty of \$2.50 for every \$100 of the value."

By sub-sec. (4) the duty is increased to \$5 for every \$100 where the aggregate value of the property exceeds \$200,000.

By sub-secs. (5) and (6), where the value of the property of the deceased exceeds \$10,000, so much thereof as passes to collaterals is made subject to a duty of \$5 for every \$100, and to strangers to a duty of \$10 for every \$100.

The contention submitted on behalf of the Treasurer is that the present case falls strictly within the terms of the 3rd sub-section of the 4th section above set forth; and that, although the property within the Province only is subject to the duty, property outside the Province should be taken into consideration in arriving at "the aggregate value of the property of the deceased," for the purpose of interpreting the section.

There is no doubt that it was within the powers of our Legislature to have enacted that the property of a deceased person situate outside the Province should be considered in arriving at this aggregate value, and it may also be conceded that the language of the sections relied on by the appellant, taken in its ordinary sense, is sufficiently wide to include such property. But the question remains whether the Act, taken as a whole, justifies such a construction, or indicates a more restricted one. The interpretation given by sec. 2 of the Act to the word "property" is that it "includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives."

Judgment,
Street, J.

Where a Provincial Act of Parliament refers to property "capable of being devised or bequeathed by will," or as "passing on the death of the owner to his heirs or personal representatives," there is, in the absence of any context, a reference exclusively to property governed by Provincial law; because by that law certain classes of property are capable of being devised or bequeathed by will and of passing on the death of the owner to his heirs or personal representatives, which in other countries and under other systems of law are subject to restrictions in those respects.

Thus in *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, it was held by Lord Cranworth that an Act which provided that every disposition of property by reason whereof any person should on the death of another become entitled to any property should be deemed to confer on the person so becoming entitled a succession, and a liability to succession duty, must be interpreted as applying only to persons becoming entitled by the laws of Great Britain. In *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524, at 530, Lord Westbury, in approving of the decision in *Wallace v. Attorney-General*, remarks: "It is quite clear that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property."

Judgment.

Street, J.

Starting, then, with the general principle that the word "property" used in the sections relied on by the appellant is, *prima facie* at least, to be restricted to property in this Province, it is necessary to consult the clauses of the Act which provide the machinery for carrying it out, in order to see whether they are in harmony or otherwise with this restricted interpretation, and I think they will be found to be consistent only with it.

Section 5 requires an executor or administrator applying for probate or letters of administration to file with the Registrar under oath "a full itemized inventory of all the property of the deceased person and the market value thereof."

Section 6 provides that in case the Treasurer of the Province is not satisfied with the correctness of such inventory or the value so sworn to, he may direct the sheriff to make a valuation of the property set forth in the inventory, and of any property improperly omitted from it.

Section 7 requires the sheriff to make such valuation and appraisement after due notice to the other persons interested.

Section 8 provides for a valuation by the Surrogate Registrar, with the assistance of the Provincial Inspector of Insurance, to determine the cash value of all life estates, annuities, and future or contingent assets, forming part of the estate of the deceased.

Section 9 gives an appeal, from the appraisement and valuation so provided for, to the Surrogate Judge, on behalf of any person interested; and gives the Judge jurisdiction upon such appeal to determine all questions of valuation, and the liability of the appraised estate to duty, subject in certain cases to a further appeal.

These provisions are all clearly intended to apply exclusively to property situated within Ontario, and there are no provisions whatever dealing with the valuation for any purpose of property situated outside Ontario. If it was contemplated that property outside Ontario should be

taken into account in determining the liability to taxation of property within Ontario, then we are met with the absurdity that the sheriff of the county here is to proceed to a foreign country to value assets there, armed with the powers conferred by a Provincial Act, and that the Surrogate Registrar, with the assistance of the Provincial Inspector of Insurance, is to estimate contingent assets, situated perhaps in the tropics, in accordance with the Provincial standards of mortality and value. I think it is unnecessary to argue that this cannot have been intended; the alternative construction limiting the meaning of the word "property" in sub-sec. 2 of sec. 3 and sub-secs. (3), (4), (5), and (6) of sec. 4 of the Succession Duty Act, to property situate within this Province, must prevail, and the appeal of the Treasurer of the Province must be dismissed, on both grounds, with costs.

Judgment.

Street, J.

E. B. B.

RE POWERS AND TOWNSHIP OF CHATHAM.

Municipal Corporations—By-law—Repeal—Public Schools Act, R. S. O. ch. 292, secs. 38, 39—Alteration of School Sections—Township Council—County Council—Appeal.

It is *ultra vires* a township council which has regularly passed a by-law under the provisions of sec. 38 of the Public Schools Act, creating a new rural school section from parts of existing school sections, to repeal or alter such by-law until the expiration of five years as provided in the Act, although the repealing by-law is passed before that creating the new section is to take effect.

The only remedy is an appeal to the county council against the by-law, under sec. 39 of the Act.

THIS was an application by George Powers, of the Gore of Chatham, part of the municipal corporation of the township of Chatham, farmer, for a summary order quashing by-law number 318 passed on the 12th April, 1898, by the municipal council of the township of Chatham, and intituled a by-law to repeal by-law number 315.

Statement.

Statement. The by-law number 315 was one purporting to create a new rural school section from parts of three existing rural school sections.

The application to quash the repealing by-law was made upon the following grounds:—

1. That by-law number 315 was regularly passed, and, unless set aside as provided by the Public Schools Act, remained in force for a period of five years, and the council had no power to repeal it.

2. That by-law number 315 was duly published to the secretaries of all the boards of trustees affected thereby, and no notice to quash the same was given within the time limited by the Public Schools Act, and thereupon it became binding for a period of at least five years, and could not be repealed by the township council.

3. That by-law number 318 was passed without any notification of the intention to pass the same being given to the persons affected thereby.

4. That upon by-law number 315 being passed, appeals therefrom to the county council of the county of Kent were duly lodged by the majority of the trustees of the school sections affected, and it thereupon became the duty of the county council to deal with the matter, as prescribed by the Public Schools Act, and incompetent for the township council, or any other body than the board of arbitrators to be appointed by the county council, to take any action for settlement of the matters complained of.

5. That the appeals taken to the county council having been withdrawn, by-law number 315 thereupon became valid and binding for a period of five years, as provided by the Public Schools Act.

6. That appeals against by-law number 315 having been taken to the county council, the rate-payers interested in supporting such by-law had a statutory right to have the boundaries of the school sections in question determined and fixed by the board of arbitrators to be appointed, and the township council had no power to deprive the rate-

payers of such statutory right by repealing the by-law Statement.
appealed against.

7. That by passing by-law number 315, and then repealing it as soon as the time for appealing to the county council had passed, the township council had deprived the ratepayers who petitioned for that by-law, of the statutory redress they would have had if the township council had neglected or refused to pass the by-law.

The following provisions of the Public Schools Act, R.S.O. ch. 292, affect the matters in question :—

38. Every township council shall have power :—

1. To pass by-laws to unite two or more sections in the same township into one, in case at a public meeting in each section called by the trustees or inspector for that purpose, a majority of the ratepayers present at each of such meetings request to be united ;

2. To alter the boundaries of a school section, or divide an existing section into two or more sections, or to unite portions of an existing section with another section, or with any new section, in case it clearly appears that all persons to be affected by the proposed alteration, division or union respectively, have been duly notified, in such manner as the council may deem expedient, of the proposed proceeding for this purpose, or of any application made to the council to do so ;

3. Any such by-law shall not be passed later than the 1st day of June in any year, and shall not take effect before the 25th day of December next thereafter, and shall remain in force, unless set aside as hereinafter provided, for a period of five years. The township clerk shall transmit forthwith a copy of such by-law and minutes relating thereto to the trustees of every school section affected thereby, and to the public school inspector.

4. Where part of any school section has been added to a city or town by order of the Lieutenant-Governor in Council, the municipal council in which such section is situated may pass a by-law for the readjustment of the

Statement. boundaries of the remaining portion of such section, notwithstanding the passing of a by-law within five years affecting the limits of such section or adjoining sections.

39.—(1) A majority of the trustees, or any five rate-payers of any one or more of the school sections concerned, may within twenty days, by notice filed in the office of the county clerk, appeal to the county council of the county in which such section or sections are situated, against any by-law of the township council for the formation, division, union or alteration of their school section or school sections; or against the neglect or refusal of the township council, on application being made to it by the trustees or any five ratepayers concerned, to alter the boundaries of a school section or school sections within the township.

(2) The time herein mentioned for appeal shall run from the date of the by-law complained of, or from the date of the meeting at which the council refused to pass such by-law, or from the first meeting after which notice was received from the clerk of the application of the trustees or ratepayers asking for such by-law to be passed, as the case may be.

(3) The county council may appoint as arbitrators not more than five, nor less than three competent persons, two of whom shall be the County Judge, or some person named by him, and the county inspector, and a majority of whom shall form a quorum to hear such appeal and to revise, determine or alter the boundaries of the school section or school sections, so far as to settle the matters complained of; but the alterations or determination of the said matters shall not take effect before the 25th day of December in the year in which the arbitrators so decide, and shall thence continue in full force for the period of five years at least, and until lawfully changed by the township council.

(4) No person shall be competent to act as arbitrator, who is a member of the township council, or who was a member at the time at which the council passed, or refused or neglected to pass the by-law or resolution.

(5) Due notice of the alterations or the determination of the said matters made by the arbitrators shall be given by the inspector to the clerk of the township, and to the trustees of the school sections concerned. Statement.

52.—(1) Any by-law of a municipality for forming, altering or dissolving a school section or sections, and any award made by arbitrators appointed to consider an appeal from a township council with respect to any matter authorized by this Act shall be valid and binding for a period of at least five years notwithstanding any defect in substance or form, or in the manner or time of passing or making the same, unless notice to quash such by-law or to set aside such award is filed in the office of the township clerk within one month of the publication of such by-law or award, and the same is subsequently quashed or set aside.

(2) Such by-law or award shall be deemed to be published when a copy thereof is served upon the secretary or secretary-treasurer of each board of trustees affected thereby.

The motion was heard by MEREDITH, J., in Court, on the 28th June, 1898.

Aylesworth, Q.C., and *A. B. Carscallen*, for the applicant.

J. S. Fraser, for the township corporation.

August 2, 1898. MEREDITH, J. :—

The repealed by-law was not an ordinary one, passed under the provisions of the Municipal Act, or affecting the municipal corporation's own affairs; but was an extraordinary one, passed under the provisions of the Public Schools Act, and directly affecting the affairs of public school boards only. The provisions of that Act, respecting such by-laws, shew very plainly their extraordinary character. They are indicative of quasi-judicial procedure rather than the exercise of the ordinary powers of a municipal council in the conduct of its own business and affairs.

Judgment. Somewhat similar procedure, in respect of township boards, is provided for in sec. 30 of the Act.
Meredith, J.

In this particular case an application was made to the township council to create a new rural school section from parts of three existing rural school sections; notice, as the Act expressly requires, was given to all persons to be affected by the desired change; the parties were heard; and the application was granted by passing the by-law. An appeal lay, and an appeal, by each of the previously existing school sections, was taken, to the county council; and that council is empowered by the Act to appoint arbitrators to hear such appeal, and to revise, determine and alter the boundaries, so far as to settle the matter complained of. Before the appeal could be heard the by-law was repealed by the township council; not by reason of any objection to its formality or regularity, but solely because a majority of the township councillors saw fit to change their minds upon the merits of the application; and this was done without notice to the persons affected.

The sole question is: Had the council power to repeal the by-law?

Without in any way infringing upon the general rule that the power to repeal accompanies the power to make by-laws—see the Interpretation Act, sec. 8, sub-sec. 38, and the Municipal Act, sec. 326—the question may and should, in my opinion, be answered in the negative.

The proceedings, as I have said, may perhaps be termed of a quasi-judicial character; and the subject-matter is one wholly separate from the municipal corporation's ordinary affairs. It is one in which persons directly concerned applied to the council for relief; it was the duty of the council—in case it clearly appeared that all persons to be affected had been duly notified—to make some change or refuse to make any—see sec. 39, sub-sec. (2)—and when that was done, by the passing of the by-law, the right of appeal to the county council immediately arose. The matter passed from the council of first instance to an appellate council, which might appoint arbitrators

to consider the whole matter, as I have already mentioned. Judgment.
The power of the township council must be expended at Meredith, J.
some time, for it can hardly be that, notwithstanding the provisions of sub-sec. (3), sec. 39, and after the county council has heard the appeal and appointed arbitrators, and after they have determined the whole matter, the township council retains power to repeal the by-law, and can then, or at any intermediate time, make futile all prior steps in the appeal against it. If the power to so repeal the by-law exists, the power to alter it—subject to the time limits prescribed in the Act—likewise exists; and such powers could be used to defeat or delay the applicants for the change, and so as to deprive them of the right of appeal given to them by the Act.

Dealing with the provisions of the Act generally, it seems to me that they indicate, with sufficient clearness, that the action of the council in the first instance is something in the nature of a determination or award, which cannot be revoked or changed except in the manner expressly provided by the Act, that is, by way of an appeal to the county council.

But it is said, in behalf of the township council, that the particular words of sub-sec. 3 of sec. 38 indicate that the by-law may be repealed or altered, provided it is done before the 25th day of December; though it is admitted, and is plain, that, under these particular words, there is no power to prevent or alter its effect for five years after that day.

The words are :—

“Any such by-law * * shall not take effect before the 25th day of December next thereafter, and shall remain in force, unless set aside as hereinafter provided, for a period of five years.”

The contention is that this means that the by-law shall not be repealed or altered for five years from the 25th day of December, and, inferentially, that it may be repealed or altered at any time before that day.

But the meaning of these words seems to me to be, that

Judgment. the changes made by the by-law shall not take effect
Meredith, J. before the beginning of the next school year, but shall then take effect and shall not be again changed for five years, unless the change is effected upon appeal to the county council: see sub-sec. (3) of sec. 39. The by-law cannot take effect, nor can it remain in force for five years, if repealed before it takes effect; and its taking effect and remaining in force can be prevented only if set aside as hereinafter provided, that is, by means of the appeal to the county council. The manner provided is one by which its taking effect at all is intended to be prevented, if the appeal is successful to the extent of setting it aside. The appeal is to be taken within twenty days after the passing of the by-law, indicating an intention to have a speedy determination of the matter, which ought readily to be reached before the 25th day of December. If the proceedings were to be delayed until the by-law took effect, there might be reason for saying that meanwhile the council might reconsider the matter; but at once, before there is any possibility of the by-law taking effect, it must be appealed against, removing the power to interfere with it to an appellate tribunal—if I may use that term. So that the words “unless set aside as hereinafter provided” have reference to the by-law as soon as passed, and not the by-law after the changes which it effects come into actual operation.

The words “and shall remain in force for five years” may well mean that the by-law shall remain in force for five years from the time of its passing, for that in effect would also mean that its effect should continue unaltered for five years at least from the 25th day of December, because a by-law passed at the expiration of five years from the passing of this by-law, effecting changes in the sections or their boundaries, would not take effect till the next following 25th day of December. And if these words have that meaning, the particular words of the enactment relied on for the township council are expressly destructive of the power they claim—the by-law shall remain in

force for five years unless set aside as thereafter provided. Judgment.

Meredith, J.

Looked at from either point of view, and without obtaining any aid from the applicant's argument based upon the 52nd section of the Act, it seems to me that the repeal of the by-law was not within the power of the township council; that, after the passing of the by-law creating the new school section, that by-law could be, in effect, set aside or altered, or, more correctly speaking, its effect could be prevented or changed, only by means of an appeal to the county council; that the township council's power, once regularly exercised, was exhausted, to revive again only at the expiration of five years.

The repealing by-law will therefore be quashed; the applicant is entitled to his costs of this motion; the county council, or the arbitrators appointed by them, will deal with the merits of the school question in dispute between the school boards and persons affected; the township council is not concerned in that now.

E. B. B.

[DIVISIONAL COURT.]

ROPER ET AL. V. HOPKINS.

Covenant—Restraint of Trade—Breach—Assignment of Interest Pendente Lite—Right to Continue Action.

Upon the plaintiffs becoming the holders of shares in an incorporated trading company, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business and given a right to repurchase the shares, and by which he covenanted, among other things, that, if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations," in the same municipality. The agreement was terminated about six months later, and about a year after its termination the defendant's son began to carry on a similar business in the same municipality. The defendant, without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced him to customers of the company, and solicited orders for him from them :—

Held, that, in order to establish a breach of the covenant, a legal contract of some sort between the defendant and his son must be shown, and, failing such a contract, it could not be said that the defendant was "connected in any way" with his son's business within the meaning of the covenant.

Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial :—

Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant.

Semble, that the benefit of the covenant would be assignable along with the shares.

Judgment of the County Court of York reversed.

Statement. AN appeal by the defendant from a judgment of the junior Judge of the county of York.

On the 5th November, 1895, the plaintiffs became the holders of certain shares in an incorporated company styled "The Aylesbury Dairy and Produce Company of Toronto, Limited," carrying on a dairy and milk business in Toronto. These shares had formerly been the property of the defendant, and upon the date above named an agreement was entered into between the plaintiffs and the defendant, by which the defendant was employed as manager of the company, and was given a right to re-purchase

Statement.

the plaintiffs' shares within a limited time, and by which the defendant covenanted with the plaintiffs that "if at any time his agreement with said company is terminated, he, the said Hopkins, will not carry on a business similar to the business carried on by the Aylesbury Dairy and Produce Company of Toronto (Limited), in the city of Toronto, or within twenty-five miles thereof, nor will he become connected in any way in any similar business carried on by any person or persons, corporation or corporations, in the city of Toronto, or within twenty-five miles thereof."

On the 21st April, 1896, the defendant entered into a further agreement with the plaintiffs, by which, in consideration of \$100, he gave up his right to the shares in the company and left its service, releasing his claims against the plaintiffs and the company, and receiving from them and from the company a release of all claims against him in respect of his dealings with the property of the company, but preserving the plaintiffs' rights under the agreement of the 5th November, 1895.

About the beginning of March, 1897, the defendant's son started in Toronto a business under the name of "The Devonshire Dairy Company," similar to that carried on by the Aylesbury Dairy Company, and the defendant, without having any pecuniary interest in his son's business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced his son to customers of the Aylesbury Dairy Company and solicited orders for his son from them.

The present action was thereupon begun by the plaintiffs to restrain the defendant from these acts as a breach of his agreement above set forth, and an interim injunction was obtained on the 14th May, 1897, until the trial.

About the 12th July, 1897, the plaintiffs disposed of their stock in the Aylesbury Dairy Company to other persons, and they ceased from that time to have any further interest of any kind in the company or its affairs, but upon selling their stock they verbally agreed with the

Statement. persons to whom they sold it to continue the present action. Accordingly, they delivered a statement of claim on the 21st October, 1897, and brought the action down to trial on the 3rd March, 1898, before the junior Judge of the county of York. At the trial it appeared for the first time that the plaintiffs had parted with their shares in the company, and were only carrying on the action because of their promise to the present owners of the stock, and not for their own benefit. The learned Judge delivered no written judgment, but the formal judgment which he directed recited that "the defendant has, in violation of his covenants and agreement with the plaintiffs, and to the prejudice of the plaintiffs, been connected with a rival business carried on by his son in the city of Toronto under the name of the Devonshire Dairy Company, and has solicited business for, and obtained orders for, and has otherwise promoted the business of, such company," and ordered "that the defendant be and he is hereby perpetually restrained from being connected with the business carried on under the name of the Devonshire Dairy Company; from soliciting business for and obtaining orders for or otherwise promoting the business of the Devonshire Dairy Company; and from carrying on a business similar to the business carried on by the Aylesbury Dairy and Produce Company of Toronto, Limited, in the city of Toronto, or within twenty-five miles thereof, and from becoming connected in any other way with any similar business carried on by any person or persons, corporation or corporations, in the city of Toronto or within twenty-five miles thereof;" and ordered the defendant to pay the costs of the action.

The defendant appealed to a Divisional Court against this judgment, upon the grounds, amongst others, that no infraction of the defendant's agreement had been shewn, and that the plaintiffs had parted with their rights and had no cause of action at the time of the trial.

The appeal was argued on the 7th June, 1898, before FALCONBRIDGE and STREET, JJ.

J. M. Clark, for the defendant, cited *Smith v. Hancock*, Argument. [1894] 2 Ch. 377; *Stuart v. Diplock* (1889), 43 Ch. D. 343; *Davies v. Davies* (1887), 36 Ch. D. 359; *Turner v. Burns* (1893), 24 O. R. 28; *King v. Hansell* (1860), 5 H. & N. 106.

Lobb, for the plaintiffs, referred to *Badische, etc., Fabrik v. Schott*, [1892] 3 Ch. 447; *Rogers v. Maddocks* (1892), 2 R. 53; *Moenich v. Fenestre* (1892), *ib.* 102; *Matthews' Covenants in Restraint of Trade*, pp. 245, 251.

September 6, 1898. STREET, J.:—

The first question is whether the defendant has broken his agreement with the plaintiffs. The agreement is two-fold:—first, that he will not within the limits prescribed carry on a business similar to that carried on by the Aylesbury Company; and second, that he will not “become connected in any way in any similar business.”

It has not been argued that what the defendant has done is a breach of the first branch of his agreement, and that may therefore be passed over; but it has been held by the Court below that there has been a breach of the second branch of the agreement, entitling the plaintiff to the injunction which has been granted. I have very carefully considered the matter, and I find myself unable to concur in the view that has been taken of it. The object of the plaintiffs in taking the covenant from the defendant, no doubt, was to prevent the defendant from injuring the business of the Aylesbury Company, by carrying on or being a party to the carrying on of a rival business. But we cannot carry the effect of such a covenant beyond what the words made use of may properly and within ordinary sense be interpreted to mean, when considered along with their surroundings.

The first branch of the agreement prevents the defendant from carrying on a similar business and would cover the case of his being a partner with persons carrying on such a business. The second branch seems to me to be aimed

Judgment.

Street, J.

at his taking service under persons or corporations engaged in such a business, or becoming a shareholder, perhaps, in a corporation so engaged. In my opinion, in order to shew a breach of the covenant that he would not "become connected in any way" with any similar business, it must be shewn that there was a legal contract of some sort between the defendant and his son, and failing such a contract it cannot be said that the defendant was "connected in any way" with his son's business within the meaning of the covenant. The fact that the defendant introduced his son to persons likely to deal with him, and asked his friends to deal with his son, might, in the absence of explanation, be evidence that he was employed by his son to canvass for him, because such services are usually done for hire; but they do not of themselves constitute a breach of the covenant in question, because they do not necessarily shew that the father was connected with his son's business. The father might say without being held to be contradicting himself, if asked whether he was connected in any way with his son's business: "I am not in any way connected with it; I am interested in seeing him prosper, and I asked some of my friends to deal with him." It does not affect the question one way or the other that the persons canvassed by the defendant were customers of the Aylesbury Company. That could only be important under circumstances which do not exist here. In my opinion, it must be taken from the evidence here that the defendant was not connected in any way with his son's business within the meaning of the covenant, and that he has not been shewn to have committed any breach of it.

I am also further of opinion that from the time that the plaintiffs sold their shares in the company, as they admittedly did about 12th July, 1897, they ceased to have any right to relief under the covenant in question. They went out of the business themselves, and it was a matter which thenceforward ceased to concern them whether the defendant did or did not carry on a business similar to that of the Aylesbury Dairy Company. It was sworn at

the trial on the part of the plaintiffs that they were carrying on the action for the benefit of the present shareholders of the company, in pursuance of a verbal promise made when their stock was transferred. But the Court does not favour the carrying on of actions by one set of persons who have no interest in the subject-matter for the benefit of another set of persons who have. Whether the benefit of this covenant would be assignable along with the shares is a matter which need not here be discussed, but there seems to be authority for it: *Benwell v. Inns* (1857), 24 Beav. 307; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438. But however this may be, I think the relief sought ought not in any event to have been granted to the plaintiffs when they had ceased to have any grievances giving them a right to relief. The very ground of coming to the Court for an injunction is the imminence of some damage against which an injunction is the best or the only protection.

In my opinion, therefore, the appeal should be allowed with costs and the action in the County Court should be dismissed with costs.

FALCONBRIDGE, J.:—

I concur in the result.

E B. B

Judgment.
Street, J.

RENNIE V. FRAME.

*Limitation of Actions—Exclusive Possession of Land—Receipt of Profits—
Pasture for Cattle.*

While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant :—

Held, that the produce of the land which the cattle ate was “profits” which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour.

Statement. THIS was an action for recovery of possession of a farm in the township of Wellesley. The writ of summons was issued on the 19th November, 1895.

The plaintiff was the devisee of the farm under the will of his father, William Rennie, who died on the 4th December, 1894. The will was dated the 19th February, 1894.

The statement of defence alleged that the defendant went into actual possession of the land in May, 1881, and had ever since been in continual, active, exclusive occupation thereof, without making any acknowledgment or paying any rent to William Rennie, or any one, and the defendant claimed the benefit of the Statute of Limitations. The defendant further alleged that when he went into possession William Rennie encouraged him to do so, and represented that, if he worked and cultivated the land, he would give him a conveyance thereof, and, in pursuance of such encouragement and representation, he went into possession, the land being at that time in a poor state of cultivation and of little value, and spent large sums of money thereon and brought it into good cultivation, and largely increased its value, and, though William Rennie several times promised to give a conveyance, he did not do so. The defendant also set up an alternative claim for the value of his improvements.

The action was tried at Berlin before ROSE, J., without **Statement.**
a jury, on the 1st April, 1896.

Aylesworth, Q.C., and William Millar, for the plaintiff.
E. P. Clement, for the defendant.

At the conclusion of the evidence and the arguments of counsel the following among other findings were made by the trial Judge.

I do not find that the defendant was put into possession of the land on any then present gift of the land to him, nor do I find that, during the lifetime of William Rennie, he ever gave up or intended to give up his title or right to the possession to the defendant. It may be that when the defendant went into possession he was the prospective son-in-law of the testator, and that it was intended that when the marriage should take place a deed of the property should be given either to the defendant or to his wife. The intention that the property should go to the daughter is manifested by a will of about that date which has been proven before me, and upon her death the intention that the property should go to the family, and not outside of the family, is manifested by a subsequent will. Nor do I find as a fact that the defendant ever asserted title in himself or title out of the true owner until after the death of the daughter, and until such a period of time had elapsed as might enable him to acquire a statutory title. It is not consistent with the evidence here that William Rennie accepted or demanded rent, as rent in the ordinary sense of the term, but it is reasonably clear, so clear that I think I must find it as a fact, that until the year 1886, and during the year 1886, from the time this defendant went into possession, William Rennie exercised ownership and control over the place to the extent of pasturing his cattle upon it, as a matter of right, and not as a matter of favour at the hands of the defendant.

Subsequently the following judgment was delivered.

Judgment. May 6, 1896. ROSE, J. :—

Rose, J.

Further consideration has confirmed me in the belief that the late William Rennie intended to give the land in question to his daughter, and purposed making a deed of it to her upon her marriage to the defendant; that, probably, anticipating a marriage without any great lapse of time, he placed the defendant in possession of the land, no doubt expecting that the produce of the land would be applied in improving the farm, and that after the defendant had his living off the farm, and had done some work upon the farm by way of fencing, repairs, and cultivation, there would not be much left. Whether this was so or not, apparently no arrangement was made for paying over to William Rennie any surplus which might be in hand at the end of the year. But I am convinced that William Rennie never intended to give the farm to the defendant, and the defendant never expected the farm to be his except as it might, in one sense, come to him through marriage with William Rennie's daughter. I think both William Rennie and the defendant looked upon the farm as being William Rennie's and under his control, and that, whatever possession the defendant had of it, it was not intended that his possession should be independent or exclusive. William Rennie, exercising his right as owner, put his cattle upon the farm to be fed and cared for by the defendant, and as to such cattle the defendant was in one sense the servant of William Rennie. These cattle were put there as of right by William Rennie and kept there as of right, and, no doubt, if the defendant had refused to allow the cattle to be there, he would have been summarily ejected. The produce of the land which the cattle ate were profits or produce by which William Rennie, by means of his cattle, took to himself and for his own use and benefit, and the defendant, in taking care of the cattle upon the land and permitting them to eat this crop, was rendering to William Rennie the produce of the land, and whatever else the cattle fed upon which had

been taken from the land by the defendant was produce of the land which went to William Rennie, and until the cattle left the land and the last of them had been delivered by the defendant to William Rennie, William Rennie was receiving produce of the land and profits, and the defendant had not exclusive possession of the land as against William Rennie.

Judgment.
Roe, J.

So, whether we regard the defendant as in possession of the land taking care of it for William Rennie until such time as the defendant and William Rennie's daughter should intermarry, or as in possession of the land as tenant at will and not as caretaker or servant of William Rennie, I think there was no time, certainly not while the cattle were on the place, that the defendant was in exclusive possession of the land so as to be able to claim a title by prescription depending upon or by reason of such possession prior to the delivery of the last head of cattle to William Rennie.

I can see no difference in principle between the defendant permitting William Rennie's cattle to eat the produce of the land and in that sense to crop it, and taking off the crop by scythe or sickle or reaping machine and feeding the crop thus gathered to the cattle, or sending it to William Rennie.

By way of further illustration, assume that the farm in question lay alongside of and adjacent to the farm upon which William Rennie lived, instead of being some miles distant, and that when the defendant went upon the land in question William Rennie had upon it or sent upon it a very large herd of cattle which did not consume all the produce of the land but left a portion of it to be gathered in by the defendant, and that these cattle or their increase remained on the farm from year to year during a period of more than ten years, and that during such period William Rennie never set his foot upon the land thus in occupation of the defendant, but merely from time to time demanded and received from the defendant such cattle as he desired to market or otherwise dispose of, could the

Judgment. defendant during such time acquire any title by possession or limitation as against William Rennie? Could he be said at any time to be in exclusive possession of the land? Would not William Rennie, during the whole of such time, have been in the enjoyment of the use and benefit of such land and in the receipt of the profits and produce thereof?

Rose, J.

Counsel told me that they had not been able to find any case directly in point or in which the question that we are considering has been discussed, and I am left to deal with the case as of the first impression. As nothing has been found contrary to the principle that I am acting upon, I feel less hesitation in deciding as I have done.

I think that what I have said is in accordance with the principle which may be drawn from a reading of the statute and the text in Darby & Bosanquet on Limitations, 2nd ed., pp. 286-7 and 505; see also pp. 300-1. On p. 301 we find the following quotation from Lord St. Leonards' Prop. Stat. 47: "'It is clear,' says Lord St. Leonards, 'that the expression 'in receipt of the profits of any land' is used in the Act, in conjunction with the words 'in possession' of the land, to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and they were no doubt introduced to prevent any question arising when the owner, although he received the proceeds, did not actually occupy the land.'"

[Judgment for the plaintiff for possession with costs; defendant to have \$500 for his improvements, less the costs payable to the plaintiff.]

E. B. B.

REGINA
V.
THE T. EATON CO., LIMITED.

Criminal Law—Code, Section 448—Prosecution for False Trade Description—Procedure.

A prosecution under section 448 of the Criminal Code for selling goods to which a false trade description is applied must be by indictment.
Prohibition granted to restrain summary proceedings before a magistrate.

THIS was an application for a prohibition directed to the deputy police magistrate of the city of Toronto, to prevent him and one Edward M. Trowern, the informant or complainant, from proceeding with a preliminary inquiry against the defendants. Statement.

The defendants, a joint stock company, were charged under section 448 of the Criminal Code with selling certain goods to which a false trade description was applied and the deputy police magistrate was proceeding to hold a preliminary investigation in the police court when the defendants objected to his jurisdiction on the grounds (1) that the offence charged could only be prosecuted by indictment; (2) that the defendants being a corporation could only be prosecuted by indictment.

The magistrate overruled both objections.

The application was argued on July 19th, 1898, before ROSE, J.

Maclaren, Q.C., for the motion.

Cavell, for the informant.

August 1, 1898. ROSE, J. :—

Section 448 of the Criminal Code is relied upon to support the proceeding against the defendant corporation here. It provides that every one is guilty of an indictable offence who does any one of the things named in the section.

It is urged on behalf of the corporation that this does not warrant summary proceedings.

Judgment.

Rose, J.

Section 450 provides for punishment as follows: "Every one guilty of any offence defined in this part is liable (a) on conviction on indictment to two years' imprisonment," etc.; "(b) on summary conviction, to four months' imprisonment," etc.

Section 451 provides "Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant, etc. Section 452 also provides for punishment on summary conviction.

It is clear, therefore, that there are offences which under part 33 of the Code it was contemplated to punish by proceedings on indictment and also others on summary proceedings.

The offence is a statutory one, and entirely apart from the question of the defendant being a corporation, I think the proceedings should be by indictment. It is not now, therefore, necessary to consider whether in any case a corporation can be proceeded against summarily. Mr. Justice Robertson considered that question in *Re Chapman and The Corporation of the City of London* (1890), 19 O. R. 33. See also Burn's Justice of the Peace, 30th ed., vol. 3, p. 6, as to a corporation in its corporate capacity being the object of an indictment.

Sections 635-9 of the Code provide for proceeding against a corporation by way of indictment and give a procedure in case of the non-appearance of the corporation.

I think that the motion for prohibition must be made absolute, with costs to be paid by the informant.

The case of *Starkey v. The Chilworth Gunpowder Manufacturing Company* (1889), 17 Cox C. C. 55, was referred to on behalf of the prosecution. The statute under which that prosecution was had expressly states that "the expressions 'person' 'manufacturer, dealer or trader' and 'proprietor' include any body of persons corporate or unincorporate." But I do not further examine that case, as I rest my judgment upon the ground stated.

G. A. B.

MCINTYRE V. SILCOX ET AL.

Life Insurance—Death of Children—R. S. O. 1887 ch. 136—Re-apportionment—Will—Grandchildren—Cancellation and Re-issue of Policies—60 Vict. ch. 36 (O.)—Creditors.

A person insured his life for the benefit equally of six of his children, three of whom died without issue in his lifetime. By his will he altered the shares of the three survivors giving a portion to another child and portions to four grandchildren and caused the policies to be cancelled and re-issued payable to "his executors in trust," and died in 1894 while R. S. O. (1887) ch. 136 was in force :—

Held, that the apportionments to the four children were valid, but those to the grandchildren while valid as legacies were invalid as against creditors.

Held, also, that the provision in 60 Vict. ch. 36, sec. 159 (O.), permitting an apportionment in favour of grandchildren "to any contract of insurance heretofore issued and declaration heretofore made," did not apply to a policy which had become a claim by the death of the insured, but was limited to policies current at the time of the passing of the said Act.

Held, also, that the issue of the new policies did not affect the rights of the parties as the executors would take in trust for those who were beneficially entitled.

Videan v. Westover (1897), 29 O. R. 1, distinguished.

THIS was an action brought by the plaintiff, a grand- Statement.
child of Elijah Clark, deceased, against his executors and certain beneficiaries to recover the sum of \$200 part of certain insurance moneys on the life of the deceased, or for administration of his estate under the following circumstances.

Elijah Clark had insured his life by two policies for the sums of \$3,000 and \$2,000 and made them payable in equal shares to six of his children. Three of these children died without issue in his lifetime.

After their death he made his will and altered the apportionment of the insurance moneys by giving more to two and less to the other of the surviving named children, and a portion to another child not named in the policies and the sum of \$200 each to four infant grandchildren of whom the plaintiff was one. He then procured the cancellation of the original policies by the insurance company and had new ones issued to him payable to "his executors in trust," and died on December 30th, 1894.

The further material facts appear in the judgment.

Statement. The action was tried at St. Thomas on May 10th, 1898, before MEREDITH, J., without a jury.

W. A. Wilson, for the plaintiff.

T. W. Crothers, for the executors.

J. A. Robinson, for defendant L. Clark.

D. B. S. Crothers, for other adult defendants.

J. S. Robertson, for the infant defendants.

August 2, 1898. MEREDITH, J.:—

Under the original certificates the whole of the sums insured was to go to six of the insured's children in equal shares; and it is admitted on all hands that the case was one within the provisions of sec. 5 ch. 136 R. S. O. (1887); the only questions in issue between the parties depend entirely upon the insured's subsequent acts respecting the moneys.

Three of the children died in his lifetime; and by his will he changed the amounts which, under the original certificates, the three surviving children would have taken, giving more to two and less to the other one of them, and also giving a portion to another child, and a portion to each of four of his grandchildren; and, after making the will, had the original certificates "cancelled," and obtained new certificates, under which the whole of the moneys were made payable to "his executors in trust."

The insured died 30th December, 1894.

The questions are, whether these subsequent acts were valid, as to the beneficiaries, and as against creditors.

Under section 6 of the Act before mentioned, the insured was given power, by "an instrument in writing," to vary an appointment previously made, and to apportion the insurance moneys, and to alter the apportionment as he might deem proper; and also, "by his will," to make and alter the apportionment of such moneys.

And, under section 8, by "an instrument in writing," to declare that the shares of the deceased children should be

for the benefit of such other person or persons as he might name in that behalf not being other than the wife and children of the insured or one or more of them. Judgment.
Meredith, J.

It was held that a will is included in the words "any writing" under section 5 of the Act: *McKibbon v. Feegan* (1893), 21 A. R. 87; and that it was not "an instrument in writing" under section 6, where what might be done by a will was expressly provided for: *Re Grant* (1895), 26 O. R. 120; but I am aware of no decision under section 8, and that section has not been the subject of so many amendments as the other two.

The power to make or alter an apportionment by will under section 6 does not seem to me to be applicable to this case, in so far as the shares of the deceased children were dealt with, because of the provisions of section 8, which are expressly applicable to such a case, and contain these restrictive words, "and in default of any such declaration, the share of the person so dying shall be the property of the insured, and may be dealt with and disposed of by him as he may see fit, and shall at his death form part of his estate."

But it gave power to the insured to deal with and dispose of these shares as he might see fit, and having seen fit, and disposed of them, they would not at his death form part of his estate: and so he might make a new declaration under the 5th section of the Act as to them, and that, according to the cases, might be done by will; so that, in so far as these lapsed shares are given to any of the children, the gifts are valid, as an original declaration, whether or not the will is an instrument in writing under, and a sufficient exercise of the power respecting lapsed gifts contained in, section 8.

If this be so, then an increase to the shares of surviving children, out of the lapsed shares, by will, would be good under section 5, and a reduction of the share of the surviving child, and an addition of the amount of such reduction to the share of another or shares of others, by will, would be valid under section 6, which permits the altering

Judgment. of the apportionment by will ; and, accordingly, the final
Meredith, J. gifts, by will, to the children were good as between themselves and as against creditors, irrespective of any enactments passed since the insured's death.

But as to the gifts to the grandchildren, though of course valid as legacies, they are not, in my opinion, gifts which, under the insurance laws, are valid as against the rights of creditors.

At the time of the insured's death he had no power to prefer grandchildren, but only his wife, children and mother : after his death, and after these moneys were recovered and paid out according to the law as it then stood, and after his estate had been administered, power to prefer others than wife, children and mother was conferred—by Act of 1897, 60 Vict. ch. 36, sec. 159 (O.),—expressly including grandchildren, and it was enacted that these provisions should apply “to any contract of insurance heretofore issued and declaration heretofore made.”

Whatever may be the effect of these retrospective words they surely cannot apply to every case ; they cannot apply to a case where long before the passing of the Act the Courts had declared the rights of the parties, and the moneys had been paid out accordingly, and the whole matter concluded and possibly passed out of memory ; nor to a case such as this ; they cannot open up every concluded transaction, however remote, and give new rights, with consequences absurd and unjust. The line must be drawn somewhere, and I would draw it at the time of the insured's death, not depriving him of the power, if he so desired, to change his declaration in consequence of the change of the law.

It is said that this is at variance with the judgment in the case of *Videan v. Westover* (1897), 29 O. R. 1, but the facts of that case were different ; in that case the money had not been paid over. I am not, therefore, required to follow it or submit the question to a Divisional Court under section 81 of the Judicature Act : if it were directly in point I would submit the question to a Divisional Court.

Dealing again with the broad question, the rule of law Judgment.
is that a retrospective statute is not to be construed so as Meredith, J.
to have a greater retrospective effect than its language
renders necessary ; and sub-sec. 6 of sec. 156 of the pres-
ent Act, R. S. O. (1897), shews that when that effect was
to be extended beyond the death of the insured, the
Legislature, as might have been expected, plainly said so.

In short, the words "any contract of insurance" mean
any existing or current contract, and the words "declara-
tion heretofore made" mean a declaration in respect of
such existing or current contract, not in respect of one that
is altogether a thing of the past, wholly performed and
ended, and so not at the time a contract at all, only one
which once was a contract.

The issue of the new certificates did not, substantially,
affect the rights of the parties ; its purpose was no doubt
to appoint trustees who, under the Act, might take the
infants' shares ; they would take in trust for those who
are beneficially entitled under the will if they could take
at all, and nothing, substantially, turns upon the cancella-
tion, as it was called, of the old, and the making of the
new, certificates.

The plaintiff fails to establish his claim to his legacy in
priority to creditors, and in that respect his action must
be dismissed ; but he is entitled to the usual administra-
tion order, as if obtained on the usual summary applica-
tion, at his risk as to costs.

He should pay the costs of the action, to the extent that
it has failed, of the executors and of the infant defen-
dants ; and there should be no order, as to such costs, of
the other parties : some of them supported the claim and
it did not affect the rights of the others injuriously.

G. A. B

[DIVISIONAL COURT.]

BEAULIEU V. COCHRANE ET AL.

Trade Union—Libel—Malice—Privilege—Evidence.

Statement. APPEAL by defendant from that portion of the judgment of the trial Judge reported *ante* page 151, directing judgment to be entered for the plaintiff in respect of the libel in the 10th paragraph of the statement of claim, for \$300 and costs, heard before FERGUSON, ROBERTSON, and MEREDITH, JJ.

L. G. McCarthy, for the appeal.

A. H. Lefroy, contra.

Held, that the evidence did not support the finding of the trial Judge that the defendants knew the words complained of were untrue; nor was there evidence of malice otherwise; and that in the absence of malice the communication was privileged.

Appeal allowed and the action dismissed with costs.

Judgment of MACMAHON, J., reversed.

G. A. B.

[DIVISIONAL COURT.

KENNEDY V. BEAL.

Arbitration and Award—Misconduct of Arbitrator—Consent—Arbitration
—R. S. O. ch. 62, secs. 12, 35, 42—Consolidated Rule 652.

By section 12 of R. S. O. ch. 62, the Court may set aside an award when an arbitrator has misconducted himself and by section 35 the Court has the same powers as to references under order as are by the Act conferred on it as to references out of Court. By Consolidated Rule 652 the Court may remit the case referred or any part back for further consideration. When an arbitrator appointed in Court by consent of the parties improperly heard evidence behind the back of one of the parties which affected a portion of the award:—

Held, that under the above sections Rule 652 does not apply to the case of an arbitration ordered by consent in Court to an arbitrator selected and agreed on between the parties and that the whole award must be set aside.

Semle, section 42 of the above statute gives a discretion to the Court setting aside an award to deal with the costs.

THIS was an appeal by the plaintiff from the judgment of ROSE, J., setting aside upon the application of the defendants an award in favour of the plaintiff. Statement.

The action which was one of account came before ARMOUR, C.J., on September 29th, 1897, and by consent judgment was directed to be entered referring under the Arbitration Act, 1897, now R. S. O. ch. 62, all matters in question in the action, and all matters of account, dispute and difference between the parties, including the costs of the action and of the reference, to the final award and arbitrament of one D. W. Alexander.

The reference accordingly was proceeded with, and one of the questions to be determined by the referee was the value of certain stock-in-trade, consisting of leather, skins in various stages of manufacture, and of certain machines and tools used in the manufacture of uppers for boots and shoes.

An arrangement before the arbitrator was come to between the parties as to the method of taking the value of the stock; but it appeared that the arbitrator, between the close of the evidence, and the making of his

Statement. award, without the consent of the defendants, and without giving them an opportunity of being heard, accepted and acted upon an estimate of the value of the larger part of the stock-in-trade furnished to him by the plaintiff alone.

This appeal was argued on April 14th and 15th, 1898, before ARMOUR, C. J., STREET, and FALCONBRIDGE, JJ.

C. Robinson, Q. C., and E. B. Ryckman, for the plaintiff.

Aylesworth, Q. C., and A. J. Russell Snow, for the defendants.

On June 27th, 1898, STREET, J., delivered the judgment of the Court, which after setting forth the facts, proceeded :—

If the arbitrator had himself placed a value upon this part of the stock without assistance from any person no objection to the award on that ground could have been sustained. But it was distinctly improper to have taken the statement of the plaintiff behind the back of the defendants as to any facts, save those strictly within the arrangement come to by the parties, and we are of opinion that because this impropriety has been committed the award, so far as this question is concerned, cannot be upheld, and this part of the matter in dispute must be treated as not having been properly determined.

We should have desired to leave the remainder of the award standing, and to have referred back only the portion of it in which the miscarriage took place. We have come to the conclusion, however, that a proper construction of the 12th and 35th sections of R. S. O. ch. 62,*

*The sections of R. S. O. ch. 62 referred to are :—

12. (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

35. The Court or a Judge shall, as to references under order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court.

Rule 652 is as follows : The Court may require explanations or reasons

requires us to hold that Rule 652 should not be treated as applying to the case of an arbitration ordered by consent in Court to an arbitrator selected and agreed on by the parties. There was, therefore, in our opinion, no course open but that of setting aside the whole award.

Judgment.

Street, J.

In our opinion, however, the portion of the order appealed from which directs the costs of the reference and award to be costs to the defendants in any event, bears too hardly upon the plaintiff under all the circumstances of the case. The defendants were themselves to some extent responsible for the error into which the arbitrator—a layman—fell in taking the plaintiff's statement. They were present at the conversation in which he was authorized to accept certain statements of the plaintiff, and they took no pains to define the extent to which these statements were to be admitted, as we think they should have done. The rule before the Judicature Act certainly was that the costs of an abortive reference were not given to either party, and although the 42nd section of ch. 62 R. S. O., probably gives a discretion to the Court setting aside an award to deal with the costs, we think this a case in which we should content ourselves with setting the award aside, and making no order as to the costs of the reference and award.

The order appealed from will, therefore, be confirmed, except that the costs recoverable under it will be limited to the costs of the motion to set aside the award.

The plaintiff must pay the costs of the present appeal.

A. H. F. L.

from the Referee and remit the cause or matter, or any part thereof, for further consideration, to the same or any other Referee; or upon an appeal from the Referee's report or certificate the Court may decide the question referred to the Referee on the evidence taken before him, either with or without additional evidence as the Court may direct.

[DIVISIONAL COURT.]

RE THE REAL ESTATE LOAN COMPANY V. GUARDHOUSE,
NEWLOVE, GARNISHEE.

*Division Courts—Jurisdiction—Splitting Cause of Action—Mortgage—
Instalments of Interest—Assignee of Covenant—Indemnity.*

A mortgagee cannot sue in the Division Court for the amount of an instalment of interest within the jurisdiction of that Court when other instalments of interest are due which bring the whole amount beyond the jurisdiction.

Sub-section 2 of sec. 79, R. S. O. ch. 60, permitting separate actions for principal and interest on a mortgage applies only to an action brought upon the mortgage by a person to whom the money is payable thereon, and does not apply to an action brought by the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it.

Judgment of ROBERTSON, J., reversed.

Statement. THIS was an appeal from an order of ROBERTSON, J., refusing a writ of prohibition to the Judge of the first Division Court of the county of Peel.

The primary creditors' action was brought to recover the sum of \$99, being one gale of interest due on a mortgage made by one James Hawkins which had been assigned to them, which interest became due on June 30th, 1897, and amounted to \$124.15 but of which they had abandoned \$25.15 so as to bring the cause of action within the jurisdiction of the Division Court.

No interest had been paid on the mortgage since December 31st, 1894, and there were at the time of the commencement of the action three gales of \$124.15 each of interest and \$1,910, the balance of the principal overdue.

The primary debtor had bought the property subsequent to the making of the mortgage and had assumed its payment as part of her purchase money and had

covenanted with her vendor to pay the mortgage according to its terms. Afterwards she had sold the property and the mortgage falling in arrear the primary creditors had obtained from her vendor an assignment of her covenant upon which their action was brought. Statement

The appeal was argued on September 7th, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

Stonehouse, for the appeal. All the unpaid principal and several gales of interest are overdue on the mortgage, and a writ has been issued for the whole, including the gale sued for in this action, so treating it as one debt. The primary creditors cannot divide their cause of action: *Re Clark v. Barber* (1894), 26 O. R. 47; *Re McDonald v. Dowdall* (1897), 28 O. R. 213. Large sums on account of both principal and interest have been paid by different owners of the property and the amount now due is an unsettled amount not within the jurisdiction of the Division Court.

Mickle, contra. The amount sued for is liquidated, and the primary creditors have not divided their cause of action. They are entitled to sue separately for the principal and each separate gale of interest if otherwise within the jurisdiction of the Division Court under sub-sec. 2 of sec. 79 R. S. O. ch. 60, where the words used are "every sum so due." "Every" means more than two and cannot be applied to two only, so there is no limitation to two actions, one for principal and one for interest. The money is due on a mortgage and was part of the purchase money. The covenant assigned is another "instrument" under the section. This case differs from *Smith v. Pears* (1897), 24 A. R. 82, where releases were obtained.

Stonehouse, in reply. Sub-sec. 2, sec. 79 R. S. O. ch. 60, does not apply. The primary creditor's claim here is as assignee of a covenant and that sub-section only applies to money due on a mortgage.

Judgment. At the close of the argument the judgment of the Court
Meredith, C.J. was delivered by

MEREDITH, C. J.:—

We think the order appealed from should be discharged and the order should go for prohibition, but not upon the ground upon which the case seems to have been argued before the learned Judge below.

The ground upon which we think there is no jurisdiction in the Division Court is that according to *Re Clark v. Barber* (1894), 26 O. R. 47, it is not competent but contrary to the provisions of the Division Courts Act for a mortgagee to sue for an instalment of interest upon a mortgage, the amount of the instalment being within the jurisdiction of the Division Court, when other instalments are due and the whole amount due exceeds that for which a suit may be brought in the Division Court.

Mr. Mickle argues that sec. 77 R. S. O. 1887 ch. 51, as amended by sec. 5 of 60 Vict. ch. 14 (O.) (R. S. O. ch. 60, sec. 79), applies, and enables what is sought to be done in this case to be done. I do not think so. I think that the whole effect of sub-section 2 is that where a sum is due for principal and also a sum for interest upon the mortgage, a suit may be brought separately for the principal and separately for the interest, but does not alter the statute as interpreted in *Re Clark v. Barber*, so as to permit a suit to be brought for a portion of the principal or for a portion of the interest.

Then there is the further difficulty not taken either in the notice of motion or before the learned Judge, that sub-section 2 applies only to an action brought upon the mortgage by a person to whom the money is payable upon the mortgage. That is not the position of this primary creditor. The primary creditor here is suing not upon the mortgage but as assignee of the mortgagor upon the covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it.

So the case seems to be one not within the jurisdiction of the Division Court but under the circumstances, while we discharge the order and direct prohibition to go, there will be no costs here or below.

Judgment.
Meredith,
C.J.

G. A. B.

THE CORNWALL WATERWORKS COMPANY V. THE CORPORATION OF THE TOWN OF CORNWALL, ET AL.

Waterworks—Municipal Corporations—R. S. O. ch. 199—Award Fixing Amount to be Paid for Property—Passing of By-law to Raise Amount—Right of Corporation to Possession—Mortgagees.

Upon the making of an award fixing the amount to be paid for waterworks in an arbitration under R. S. O. ch. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the amount of the award, the corporation are entitled, under sec. 62, to the possession of the property; and, therefore, no action will lie against them to recover the possession so acquired, nor against their agent duly appointed to take possession.

The six months provided for by sec. 64 within which the amount must be paid or the company be entitled to resume possession must have elapsed before action brought to recover possession by the company. It is not sufficient that that period should have elapsed at the time the action is tried.

Mortgagees of a waterworks company, who are not parties to the arbitration, and who have taken no part in the taking of possession are not necessary parties to an action by the waterworks company to recover possession.

THIS was an action tried before STREET, J., without a Statement. jury at the Cornwall Spring Assizes on 10th May, 1898.

D. B. MacLennan, Q.C., for the plaintiffs.

Leitch, Q.C., for the corporation of Cornwall and James Strickland.

Bruce, Q. C., for the Farmers Loan and Trust Company.

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Statement. The following statement of facts is taken from the judgment of the trial Judge :

The plaintiffs were incorporated several years ago under the Act, which is now represented by R. S. O. ch. 199, for supplying the town of Cornwall with water. In the year 1897, the defendants, the corporation of the town of Cornwall, gave notice to the plaintiffs that they intended to acquire the property and works of the company under sec. 62, of R. S. O. ch. 199, by arbitration. The property of the company was then and still is subject to a mortgage to the defendants, the Farmers Loan and Trust Co. of New York, to secure \$80,000 of bonds issued by the plaintiffs with interest at six per cent. having still several years to run.

The town corporation proceeded with arbitration proceedings to determine the amount to be paid for the property, but did not make the mortgagees parties. The arbitrators awarded an amount which is not sufficient to pay off the mortgage. The plaintiffs appealed against the award and their appeal was dismissed.

Pending the appeal the town corporation submitted and finally passed a by-law to raise the amount to be paid under the award, and paid the amount into a bank at Cornwall to the joint credit of the plaintiffs and the Farmers Loan and Trust Co.

This payment was made without any order of Court and without the previous consent of either the plaintiffs or the Trust Co., but the latter endeavoured, without success, however, to get the plaintiffs to join with them in withdrawing the amount and applying it on the mortgage.

The money still remains in the bank to the credit of the account into which the town corporation paid it. Upon the day the money was paid in, and after the passing of the by-law for raising it, the town corporation through their agents, duly appointed by by-law, demanded possession of the property of the plaintiffs, and upon possession being withheld they sent some policemen and obtained admission through a window, whereupon the plaintiffs'

servants in possession attorned to them and they have ever since retained possession. Statement.

The plaintiffs immediately began this action to recover back possession of the property and to obtain the value of certain stores of coal, etc., belonging to them which the town corporation have used, and to recover certain water rates payable to them by the town corporation down to the time the latter took possession. The defendant Strickland was the officer appointed by the town corporation to obtain possession of the property.

June 4th, 1898. STREET, J.:—

Upon the making of the award and the final passing of the by-law for raising the money required to pay for the property the town corporation became entitled under sec. 62 of R.S.O. ch. 199 to the possession of the property. They succeeded in obtaining possession without a breach of the peace and are therefore entitled to hold it: *Taylor v. Cole* (1789), 3 T. R. 292; *Stroud v. Kane* (1856), 13 U. C. R. 459.

The present action was brought within a few days after the time at which the amount of the award was payable; and the plaintiffs are, therefore, not entitled to rely upon section 64 of the Act which provides for their resuming possession if the amount awarded is not paid within six months after it becomes payable under the award.

The plaintiffs' counsel contended that he could take advantage of the fact that that period had elapsed at the time the case was tried, but I can find no authority to support this contention, and I must, therefore, dismiss the action so far as the claim to possession of the land is concerned.

I can see no ground for maintaining the action against the defendant Strickland, who simply acted as the duly authorized agent of the town corporation in taking possession of the property which was the subject of the award. I can see no ground upon which the Farmers Trust and

Judgment. Loan Co. could be made parties, and the action will, there-
Street, J. fore, be dismissed against them as well as against the
 defendant Strickland with costs.

The plaintiffs established an account against the town corporation as follows:—

97 tons, 1,600 lbs. coal, at \$3.45	\$337 41
40 gallons oil	32 00
G. T. R. water rents for June and to 13th July	125 00
Hydrant rent from town to 13th July	259 26
General water rates	167 44
Further G. T. R. rents to 13th July	60 00
General arrears which the town assumed, directing the debtors to pay them and not the plaintiffs	75 14
	<hr/>
	\$1,056 25
Less proportion of rents collected by plaintiffs in advance	279 06
	<hr/>
Balance due plaintiffs	\$777 19

This sum should be paid by the defendants the town corporation to the plaintiffs. The amount was practically not in dispute before me; but the town corporation contended that they were entitled to hold it in case they should be compelled to pay to the mortgagees more than the amount of the award.

I do not agree in this contention. They have chosen to take possession of the property with knowledge of all the facts. I cannot speculate as to what may be the ultimate outcome of their action. But in the meantime they owe the plaintiffs this \$777.19 and there is no debt existing against which they can set it off, for they have not paid either to the plaintiffs or to the mortgagees any money at all. The deposit in the bank at Cornwall has not been adopted by either of the parties to whose credit it was paid; and, in order to save further question about it, I will include in the present judgment a declaration that it is the

property of the town corporation and should be paid to them free from any claims by either the plaintiffs or the Trust Co. Judgment.
Street, J.

The plaintiffs are entitled only to a judgment against the town corporation for this \$777.19 with costs of the action, and the defendants the town corporation are to be entitled to set off the costs of the issues upon which they have succeeded.

G. F. H.

IN THE MATTER OF THE ESTATE OF GEORGE LEWIS, LATE
OF THE CITY OF TORONTO, DECEASED.

Advancement—Intestacy—Release by Son of Intestate—Claim by Grand-children.

A son, in consideration of his father conveying to him certain land, accepted it as an advancement, in lieu of and in full of all claims and demands against his father's estate either for wages or as one of his co-heirs or next of kin, and agreed that neither he nor his heirs would make any claim against the estate, nor attempt to set aside or invalidate any will or conveyance made by the father. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as co-heirs or next of kin of the grandfather to share in the estate of the latter :—

Held, the children took, if at all, *per stirpes*, i.e., as representatives of their father, and as he would have been precluded by the agreement from taking anything, so were the children.

Held, also, that the conveyance by the father to the son was an "advancement."

THIS was an application by way of an originating notice under the provisions of rule 938 by the Toronto General, Trusts Company, the administrators of the estate of George Lewis, deceased, who died intestate in the month of June, 1897, leaving him surviving several children and grandchildren. Statement.

The application was heard before FERGUSON, J., on June 17, 1898.

Statement. *Alfred Hoskin*, Q. C., for the four adult daughters of the deceased.

A. E. Hoskin, for the administrators.

W. Macdonald, for the adult children of George Edward Lewis, deceased, son of George Lewis.

A. J. Boyd, for the infant children of George Edward Lewis.

June 21, 1898. FERGUSON, J.:—

The question for determination is as to whether or not the children of George Edward Lewis, who was a son of the intestate and who died in the year 1890, are entitled to share in the estate of their grandfather George Lewis, such estate being in part lands and in part personalty, the chief part, however, being personalty.

In the event of its being determined that these grandchildren are entitled to share in the estate a further question will arise as to whether or not they should bring into "Hotchpot" certain lands granted and conveyed by the intestate to his son George Edward Lewis, by deed bearing date the 10th day of December, 1880, which deed appears to have been and was executed in pursuance of an agreement under seal between the father and the son bearing even date therewith. Mary Gertrude Lewis the wife of the said George Edward Lewis was also a party to this agreement.

This agreement recites that differences had arisen between the parties to it, and that George Edward Lewis the son had agreed with George Lewis the father, that in consideration that the father should grant and convey unto the son all his interest in certain land, about two acres described by metes and bounds in the document, the son should relinquish all claims he then had against the father, or which he might thereafter have as co-heir at law of, or next of kin to the father, and that the son would not attempt to enforce any such claim or claims.

The agreement then witnesses that in consideration of

the premises and of the grant and conveyance of the land by the father to him, he the son for himself, his heirs executors, administrators and assigns, covenanted, promised and agreed, to and with the father, his executors, administrators and assigns, that he the son accepted the lands so granted and conveyed by the father as an advancement to him in lieu of and in full satisfaction of any and all claims whatsoever, which he the son then had, or which he or his heirs, executors, administrators, or assigns, might thereafter have or claim to have against the father, his executors, administrators, or assigns, or the estate of the father, either for moneys or wages then already due or claimed to be due from the father, or as one of the co-heirs of or next of kin to the father; and that the son further covenanted, promised, and agreed to and with the father that he (the son) would not ask, receive or claim or demand of or from the estate or of or from the father, his heirs, executors, administrators or assigns, any sum or sums or other compensation in respect of any claim against the father, or of past services done or performed for the father in any manner whatsoever, and that he (the son) should not nor would ask, recover, claim or demand of or from the estate of the father any portions, sum or sums as one of the co-heirs or next of kin of the father, and would not interfere with or attempt to set aside or render void or of no effect, any will or conveyance or intended will or conveyance of or by the father, and that the son relinquished all right, claim or demand which he then had against or might thereafter have as one of the co-heirs or next of kin of the father.

Judgment.
Ferguson, J

The then wife of the son ratified and confirmed the agreement, and agreed that she should be bound by it to the same extent and in the same manner as her husband. (This last is so stated on the face of the agreement whatever may have been the effect of it.)

It was conceded in argument that if George Edward Lewis, the son, were living and seeking to obtain a share of his father's estate as co-heir at law or next of kin, he

Judgment. would be precluded from obtaining it by this transaction; but it was contended that his children are not so precluded, as their claim as co-heirs or next of kin is not a claim through their father but as co-heirs or next of kin of their grandfather George Lewis, the intestate; and they say that their father had not power to bind them or affect their interests by his covenants or agreements.

Ferguson, J.

As to the small portion of the estate, that is not personally as such, no claim having been made or question or contention raised under the provisions of 54 Vict. ch. 18 (O.), or the subsequent Acts amending that Act, this portion of the estate is, under the provisions of sec. 4 of R. S. O. 1887, ch. 108 which is the same in this respect as sec. 4 of ch. 127 of the last revision, distributable as personal property is to be distributed; and, assuming this to be so, the whole estate for purposes here may be treated as personal property. Then I think the law as laid down in Williams on Executors, 9th ed., at pp. 1368 and 1369 applies, and according to this these children of George Edward Lewis, grandchildren of the intestate, would take, if at all, *per stirpes*, that is to say, not in their own rights but by representation. They would be entitled, if at all, as representing their father.

Then, assume that these grandchildren cannot take in their own rights but only as representing their father and taking what he, if living, would have been entitled to, and, it having been conceded (as I think properly conceded) that their father if living would be precluded from taking anything, the conclusion is that these grandchildren are not entitled to share in the estate at all.

This, I think, is the proper view of the matter, and so it is not absolutely needful that I should say anything in respect to the other question, yet it may not be amiss to express the opinion that the conveyance of the land by the father to the son was an advancement to the son. An advancement has been perhaps fairly well defined as being a payment or appropriation of money or a settlement of real estate made by a parent to or for a child in advance or in anticipation of the distributive share to which such

child would be entitled after his death. Yet there are many cases in which the payment or appropriation has been held to be an advancement in which it does not appear from a perusal of the decisions that it was done in anticipation of a distribution after the death of the parent. Here (in the present case) the agreement employs the word "advancement," and plainly speaks of such a distribution. The land was conveyed to the son by the father and I am clearly of the opinion that there was an advancement.

Judgment.
Ferguson, J.

In the American and English Encyclopædia of Law—a work in which the cases and authorities on the subject are excellently collected and arranged; a work that, as I think, cannot be overpraised—the definition given is: "An advancement is a transfer of property from a person standing *in loco parentis* toward another, to that other, in anticipation of the share of the donor's estate which the donee would receive in the event of the donor's dying intestate." See 2nd ed. (1896), p. 760 and 761, where in the foot-notes definitions are given in somewhat varying words and the sources of and authorities for them concisely stated. Amongst very many others that given by the Chancellor in the case *Re Hall* (1887), 14 O. R. 557, at 559, is referred to. A transfer of property in consideration of a release of all interest in the parents' estate will be considered an advancement. A deed to a son in consideration of his renouncing all claims upon the other property of his father is valid. A father can impose as a condition to conveying the property to his son the release of all claims to his personal property, though the son claimed—but the father did not concede—that he was entitled to the conveyance as a matter of right. See the case *Kinyon v. Kinyon* (1894), 57 N. Y. St. R., p. 850, where the subject of such an advancement is discussed and a decision given. The case is referred to in the Am. & Eng. Encyc., at p. 771, as being 6 Miscellaneous R., N. Y. Sup. Ct., p. 584.

A release in full of all claims against the ancestors' estate given on the receipt of the advancement by the heir, *sui juris*, is binding and bars any future claim, and this

Judgment. even though the value of the property received is much less than would be that of a share on distribution : *Quarles v. Quarles* (1808), 4 Mass. 680 ; *Kenney v. Tucker* (1811), 8 Mass. 143.

When the advancement was one taking effect *in presenti* (as in this case) it is to be reckoned at its value at the time it was made. If to take effect *in futuro* it is, if necessary, to be reckoned at its value at the time the donee came into actual possession and enjoyment of it : Am. & Eng. Encyc., pp. 782 and 784, and cases there referred to, 2nd ed.

A statement signed by the donee at the time of his taking the property that it is taken as an advancement is binding on him : *Lockyer v. Savage* (1732), 2 Stra. 947.

Then, taking it to be an advancement, the law applicable seems to be plainly enough stated in Williams on Executors 9th ed., pp. 1370, 1371, where it is said : " If a child who has received any advancement from his father shall die in his father's lifetime leaving children, such children shall not be admitted to their father's distributive share unless they bring in his advancement, since as his representatives they can have no better claim than he would have had if living."

This proposition was laid down as long ago as the decision in *Proud v. Turner* (1729), 2 Peere Wms., p. 160.

It was said in argument that the value of the lands conveyed to George Edward Lewis by his father was about equal to the distributive share that is claimed by these grandchildren of the intestate ; and, assuming this to be the case, it would make little difference if they were permitted to take, they bringing the advancement or its value into " Hotchpot." Besides, see secs. 50, 51 and 52 of R. S. O. (1887) ch. 108 ; secs. 60, 61 and 62 of R. S. O. (1897) ch. 127.

I am, however, as already stated, of the opinion that these grandchildren cannot in all the circumstances appearing be permitted to share in the estate of the intestate at all. As to the costs of the motion : It rather appears to

me that owing to the peculiar transaction made with his son the intestate left his estate subject to some degree of doubt in respect to the distribution of it, and I think I shall not be far astray in saying that the administrators should have trustees' costs out of the estate in their hands, and that the grandchildren should bear and pay their own costs. I am, however, willing to hear what counsel may choose to say as to costs.

Judgment.
Ferguson, J.

As to the costs. After hearing counsel who appear pursuant to the last clause in the within judgment, I am convinced that this is a case in which the costs of all parties should be paid out of the estate. The costs of the administrators will be trustees' costs.

It was contended that an action of ejectment subsequently brought by the father against the son (proceedings in which were put in) had the effect of shewing that the transaction was not voluntary on the part of the father and that for this reason it was not an advancement. I have considered this and I cannot accede to the contention.

G. F. H.

[DIVISIONAL COURT.]

DOUGLAS V. STEPHENSON.

Libel—Defamation—Public Official—Newspaper—Comments in, on Conduct of—Belief in Truth of Statements Published—Erroneous Charge—New Trial.

The discussion of the conduct of a solicitor of a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticise or make fair comments thereon ; but the statements on which the criticism or comments are based must be true and not merely believed to be true on reasonable grounds.

Where, therefore, in an action for libel for statements published in a newspaper on which comments were made criticising the plaintiff's conduct as such solicitor, the jury, although they were told by the trial Judge in his charge that any criticism on the plaintiff's conduct must be based on the truth, were at the same time told that it was sufficient if the statements, on which the criticism was founded, were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial directed, MACMAHON, J., dissenting upon the ground that there was evidence of the truth of the matters commented on, and that the charge, which was not objected to, must be taken in its entirety.

Statement. THIS was an action tried before ARMOUR, C. J., and a jury at Chatham, on the 31st of March, 1898.

The plaintiff, who had been practicing his profession of barrister and solicitor, in Chatham, and had been clerk of the peace and county crown attorney for the county of Kent for thirty years, and was also solicitor for the city of Chatham, sued the defendant who was the proprietor and publisher of "The Chatham Daily Planet," a newspaper published in the city of Chatham, for publishing in the issue of that paper of the 21st of January, 1898, an alleged libel reflecting on him personally, and in his professional character as a barrister and solicitor, and which is set out in the statement of claim as follows :—

(Paragraph 4.) "A hint to Mr. Douglas. * * The city of Chatham wants better service from its solicitor in 1898 than it got in 1897. On two occasions Mr. Douglas allowed natural gas agreements to go through the council that were bad, wrong and unjust to the municipality. He was the man to tell the alderman so. Business of that

kind is what a city wants a solicitor for. But he did not do so. Mr. Douglas must understand that though this city has forgiven these sins of omission it has not forgotten them, and the city also recognizes the fact that at some period forgiveness ceases to be a virtue. Sound advice from their solicitor should have prevented confiding aldermen from being carried away by the sleekness of tongue which is Mr. Cowan's stock in trade. So much for this agreement which Mr. Douglas should have told the council to put in the fire, but which he sat by and allowed to pass." The defendant thereby meaning that the plaintiff had neglected to perform his duty as a solicitor, and as the solicitor for the city of Chatham, and had wilfully, improperly and negligently permitted injurious acts to be done, and contracts to be entered into by the city, detrimental to its interests which the plaintiff could and should by exercising proper care have prevented.

5. In the same article, and as part thereof, and in the same paper, the defendant also falsely and maliciously wrote and published of the plaintiff, with the intent aforesaid, and to secure the plaintiff's dismissal by the city of Chatham as its solicitor, the words following: "The monument case is another sample of the way this city has been getting its law. City solicitor Douglas drew by-laws providing that sewers shall run in certain places. In running these sewers, surveyors' monuments were raised and replaced. Some individual ran to county crown attorney Douglas, and he commenced the prosecution of the city's officials. His position as county crown attorney may have compelled him to take up the case. It is the only excuse that can be offered. If it did not, the council was derelict in not dispensing with his services the very next meeting. But if it did, then a sense of professional delicacy should have induced him to turn over the prosecution to somebody else. These are but two instances, but they are enough to shew how this city has been served, and it will not stand so being served any longer;" thereby meaning that the plaintiff, as the solicitor for the city of

Statement.

Statement. Chatham, had not protected but was injuring the city of Chatham by his acts, and wilfully interfering with its officials. And also that the plaintiff, both as a barrister and solicitor and as the county crown attorney, did not know how to perform his duties properly, and used his official position improperly to the injury of the city of Chatham; and that he improperly and unduly and with undue haste began the prosecution of the city's officials; and that the plaintiff was guilty of professional misconduct and ignorant of and defective in the sense of professional respect and propriety which should characterize a solicitor as such and a county crown attorney; and that other equally improper acts, injurious to the interests of the city of Chatham, had been done and committed by the plaintiff as solicitor for the said city of Chatham, and for which the plaintiff should be dismissed from his appointment of solicitor for the said city.

The defence was that the alleged libels were published by defendant as a public journalist, and that the article was a fair comment on matters of public interest, and was published *bond fide* and without malice and for the benefit of the public, and that the occasion was privileged.

By the 9th paragraph of the defence there was set up as published in the defendant's newspaper what he alleged to be a sufficient apology or retraction, as follows: "Mr. Douglas thinks that the recent criticism on the duty of a solicitor which appeared in these columns reflects on him. The article simply indicated what this journal believed was the duty of a city official in dealing with certain matters that vitally affect the interests of this city. No reflection whatever was even implied against Mr. Douglas' legal ability or professional integrity."

The learned Chief Justice in his charge to the jury told them that the question was, whether the article complained of was "a fair criticism of the plaintiff's conduct as the solicitor of the city of Chatham. If it was a fair comment upon it, then the defendant would go free. If it was not a fair comment, then it is no answer to the libel at all. In

order to ascertain whether it is a fair comment or not you have to look at the facts to see whether it is based upon the truth; or see whether the party who wrote it, came to the conclusion, having reasonable grounds for doing so, that it was true, and so criticised his conduct. If it was true, if the foundation of it was true, then the criticism would be proper, fair and right; but if it was based on what was false, or if the party who wrote the criticism did not honestly believe upon reasonable grounds that it was true, then it would not be a fair criticism." Statement.

He further said, "In order to be satisfied that it is a fair criticism of a public man in a public capacity, such as Mr. Douglas as city solicitor, you have to be satisfied that it is founded upon truth, or that, at all events, having reasonable grounds for doing so, the defendant believed in the truth of it."

The jury found a verdict for the defendant, and judgment was directed by the learned Chief Justice accordingly in his favour with costs.

The plaintiff moved on notice to set aside the verdict entered for the defendant, and the judgment directed to be entered thereon, and for an order directing a new trial, on the grounds that the verdict was against law and evidence, and the Judge's charge, and was such as no jury acting as reasonable men could have found; and also because the verdict of the jury was either perverse or shewed that they failed to understand the evidence or their duty; and also on the ground of the improper admission of evidence.

On May 11th, 1898, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ. *Shepley*, Q. C., supported the motion. To justify the publication of the article containing the criticism of the plaintiff's conduct as such solicitor, the defendant should have proved that the statements made in the article which are complained of were true. There must be the evidence of the fact, and not merely the defendant's belief in its truth—when the facts are true, then comments thereon

Argument. may be made, so long as the criticism is fair. All the cases start with the proposition of a proved undeniable fact, and then you can comment as much as you please. There is no question as to the statements being untrue as to the gas contract. The plaintiff did all he could to point out the objectionable features of the contract and to protect the council in the matter. In fact it is not contradicted that he did this before the committee. Then as to the street monuments, the statements published were also wholly untrue, for the official charged with the offence pleaded guilty. The charge of the learned Chief Justice was erroneous in telling the jury that it was sufficient if the defendant believed the statements to be true. He referred to *Odger on Libel and Slander*, 3rd ed., pp. 34-5, 110, 612-3; *Peters v. Bradlaugh* (1888), 4 Times L. R. 467; *Davis v. Shepstone* (1886), 11 App. Cas. 187, 190; *Purcell v. Souler* (1877), 2 C. P. D. 215; *Bryce v. Rusden* (1886), 2 Times L. R. 435; *Brenon v. Ridgway* (1887), 3 Times L. R. 592; *Blair v. Cox* (1892), 37 Sol. J. 130; *Peters v. Wallace* (1856), 5 C. P. 238; *Levi v. Milne* (1827), 4 Bing. 195; *Hakewell v. Ingram* (1854), 2 C. L. R. 1397.

John King, Q. C., contra. The question in all these cases is one of honest belief in the truth of the statements published based on reasonable grounds. If the defendant had reasonable grounds for believing the statements to be true he is protected. There is no question but that the comments made were fair, and that the criticism was based on reasonable grounds, as is shewn by the evidence. What amounts to a fair comment is laid down in *Stephen's Criminal Law*, 5th ed., Art. 274, p. 202. See also *Hunter v. Sharpe* (1866), 4 F. & F. 983, and note, at p. 1007; *Folkard on Slander*, 6th ed., 270, 278; *Kelly on Newspaper Libel*, p. 50; *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 3 F. & F. 421, and notes; *Merivale v. Carson* (1887), 20 Q. B. D. 275, 280-1; *Parmiter v. Coupland* (1840), 6 M. & W. 105; *Odger v. Mortimer* (1873), 28 L. T. N. S. 472. The evidence believed by the jury proved that the plaintiff never made any protest before the council as to the objectionable

features of the gas contract. The question was wholly for the jury. No objection was made at the trial to the charge, and therefore the ground of misdirection is not tenable: *Willis v. Carson* (1889), 17 O. R. 223. Even assuming that the contention of the plaintiff is correct the charge cannot be complained of by the plaintiff. The one to complain, if at all, would be the defendant. The charge all through points out to the jury that the comments must be based on the truth, although there is an expression used which might be read as holding that reasonable belief was sufficient, yet the whole charge must be looked at. Then as to the street monuments, all that is said by the defendant amounts merely to professional indelicacy on the plaintiff's part, which does not constitute libel. However, this was a question for the jury also, and they having found for the defendant the Court should not interfere. On the question of a new trial for misdirection he referred to *Phillips v. London and South-Western R. W. Co.* (1879), 5 Q. B. D. 78, 49 L. J. N. S. Q. B. 833; *Metropolitan R. W. Co. v. Wright* (1886), 11 App. Cas. 152; *Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133; *Australian Newspaper Co. v. Bennett*, [1894] A. C. 284; *Broome v. Gosden* (1845), 1 C. B. 728, 731; *Bray v. Ford*, [1896] A. C. 44.

August 1st, 1898. MEREDITH, C. J. :—

It was not disputed at the trial, or in argument before us, that the conduct of the plaintiff, in his capacity of solicitor for the corporation of Chatham, was a matter of public interest, and that the defendant, as the publisher of a public newspaper, was justified in making fair comments upon the manner in which the duties of that office were performed by the plaintiff; but the complaint is, that what was published, and forms the subject-matter of the alleged libels, was untrue in fact, and not justifiable or excusable under the rules of law applicable to fair comment or fair criticism.

Judgment.
Meredith,
C.J.

I am unable to agree with the argument of the defendant's counsel, that in this class of case, however untrue the allegations of fact may be, they are justifiable, if the person making them on reasonable grounds believes them to be true, and the language used is within the limits that would be allowed for criticism or comment on the assumption that they were true.

That such was the law was the opinion of the learned Chief Justice, and he so directed the jury.

The cases of *Lefroy v. Burnside* (1879), Ir. L. R. 4 C. L. 556, and of *Davis & Sons v. Shepstone* (1886), 11 App. Cas. 187, support the view that the limits of fair comment are not so wide as contended for, and shew what would seem to me ought, upon principle, to be beyond question, that however liberal the law may be as to permitting the acts, conduct and opinions of public men or persons in public positions to be criticised and commented on, it is not permitted, however honestly the belief that the statements are true may be entertained by the person making them, and though he may have reasonable grounds for his belief, that allegations of fact may be made which are untrue in fact, and these allegations commented on in the same way and with the same latitude as if they were true.

The groundwork of the defendant's criticism of the conduct of the plaintiff in reference to the natural gas agreements was the allegation that he had failed in his duty to his clients, the municipality, in not pointing out the objectionable features of the agreement from the standpoint of the municipality, but had allowed the council to assent to them without the attention of its members being called to these objectionable features. These allegations were unfounded, as the evidence shewed that the objectionable features of the agreement had been pointed out by the plaintiff to the committee of the council which was charged with the duty of settling the terms of the agreements, but being insisted on by the other parties to them, had apparently to be acquiesced in or the negotiations be abandoned.

The fact that the defendant honestly believed on reason-

able grounds the truth of his allegations of fact, as the jury no doubt thought, as I have said, in my opinion, did not justify the publication, if they were in fact untrue, though it might properly be considered by the jury in assessing the damages to be awarded to the plaintiff.

Judgment.
Meredith,
C.J.

It follows from what I have said that in my view the charge of the learned Judge was erroneous in directing the jury, as he did, as to the law, substantially in accordance with the statement of it contended for by the defendant's counsel, and there must, therefore, be a new trial on this branch of the case.

With regard to the other complaint of the plaintiff, if that were the only matter involved in the action, I should not feel warranted in interfering with the finding of the jury, for it probably proceeded upon the view that what is complained of was not libellous, a view which was, I think, open to them to adopt; but if the case is to go down for another trial, I think it should be of the whole case.

In my opinion, the verdict and judgment should be set aside, and a new trial had between the parties; and the costs of the last trial and of this motion should be costs in the cause to the party who is ultimately successful.

ROSE, J. :—

The learned trial Judge said to the jury, as pointed out by my learned brother MacMahon, that "if the party who wrote the criticism did not honestly believe upon reasonable grounds that it was true, then it would not be fair criticism." Then, again, "you have to be satisfied that it is founded upon truth, or that at all events having reasonable grounds for so doing the defendant believed in the truth of it." Very possibly the language of the learned Chief Justice was used with reference to the case of *Paris v. Levy* (1860), 2 F. & F. 71, referred to in *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, by Cockburn, C. J., at p. 777, as follows: "In *Paris v. Levy* (1860), 2 F. & F. 71, there may have been an honest and well founded belief that the man

Judgment.

Rose, J.

who published the handbill which was commented upon could only have had a bad motive in publishing it, and if the jury were of that opinion, the writer who attacked him in the public press would be protected."

But it seems to me the language of the learned Chief Justice at the trial of this case went farther, and was in substance and effect that although the statements of fact upon which the criticism was founded were not true, yet that if the defendant had reasonable ground for believing them to be true, and did in fact believe them to be true, he was justified in making the comments. This, I think, is not the law.

In *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, Cockburn, C. J., said, at p. 776: "Mr. Bovill is obliged to say that, because the writer of this article had a *bonâ fide* belief that the statements he made were true, he is privileged. I cannot assent to that doctrine."

Crompton, J., said, at p. 779: "The finding of the jury, that the writer of the article believed what he wrote to be true, affords no answer to the action."

Blackburn, J., said, at p. 781: "*Bonâ fide* belief in the truth of what is written is no defence to an action."

Cockburn, C. J., said, at p. 776: that "honest belief" in the truth of statements of the defendant must not be "without foundation," which I take to mean must be based upon facts.

I refer to Odger on Libel and Slander, 3rd ed., p. 36, where, quoting from *Lefroy v. Burnside* (1879), Ir. L. R. 4 C. L. 556, referred to by the learned Chief Justice of this Court, and *Blair v. Cox* (1892), 37 Sol. J. 130, it is said: "If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails."

I think that the charge of the learned Chief Justice at the trial was calculated to lead the jury into a belief that notwithstanding that the criticism was not "founded upon truth," if upon grounds that appeared reasonable to the defendant he believed the statements he made, and upon

such belief founded his criticism, the defence was made out: and so I think the charge was in that sense not fair to the plaintiff.

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I concur most willingly in the opinion of the learned Chief Justice that there should be a new trial. I think that no one can reasonably come to the conclusion that the comment was fair, and that the language was just and reasonable.

The result of what was stated, as extracted by my learned brother MacMahon, is that either the plaintiff was ignorant of law, and so incapable of discharging his duty as a solicitor, or that he neglected his duty, or that he was wilfully misconducting himself, and that his conduct was such as would have justified the municipality in dismissing him from his office, that it was a "sin" which required "forgiveness," but if repeated would be too grievous to be forgiven.

In view of the opinion at which I have arrived, it is unnecessary to consider very carefully the case of *Odger v. Mortimer* (1873), 28 L. T. N. S. 472, referred to by my learned brother MacMahon, but its force in favour of the defendant's contention is much weakened when we observe that the defendant in that case pleaded not guilty, justification, and fair comment, and had a general verdict. In giving judgment, which apparently was given at the close of the argument, observations were made upon the province of the jury where there was an issue of fair comment, but these observations must be read in the light of the fact that the jury had found that the alleged defamatory matters were true in substance and in fact.

Justice Grove said, at p. 473: "I do not see how we can possibly interfere, the defendant being entitled to the verdict upon the finding of the jury that the plea of justification was proved."

Denman, J., said: "My judgment is founded on the assumption that the jury found their verdict upon the plea of not guilty."

Honyman, J., said: "However, here we have a special

Judgment. jury of the city of London finding, after great deliberation
Rose, J. (on which plea it is immaterial), a verdict for the defendant, in an action of libel, and I think that we cannot interfere."

It seems to me that had the plaintiff in that case a verdict on the plea of justification, it would have been difficult for the defendant to have retained his verdict on the plea of fair comment.

Since writing the above, I have had my attention called to the case of *Brown v. Moyer* (1893), 20 A. R. 509, which refers to *Wills v. Carman* (1889), 17 O. R. 223. I extract the following from the judgment of the Court in *Wills v. Carman*, at p. 225: "And he was entitled to shew that the matters upon which he commented were true, and without doing so it is clear that he could not have established his plea of fair comment."

MACMAHON, J.:—

The corporation of the city of Chatham were about entering into an agreement with the Standard Oil and Gas Company of Essex by which the said company was to supply the city and the inhabitants with gas for illuminating and heating purposes, and an agreement embodying the terms of the proposed contract had been prepared by Mr. Cowan, the solicitor of the gas company. It was to the tenth and fifteenth clauses of that agreement that the defendant, in the article complained of, took exception. The tenth clause provides: "That the company shall and will indemnify and save harmless the city against any and all damage, expense, cost and charges, which it, the said city, may be put to by reason of any act, neglect or default of the company, its servants or agents in constructing, operating or removing the said plant in any way whatsoever." And the fifteenth clause reads: "That the said city shall have the right to purchase from the company all the natural gas plant situated in the city of Chatham, which may be owned and operated by the

company, at any time, on giving one year's notice in writing, of their intention so to do, said notice to be mailed by registered letter addressed to the head office of the company at the city of Windsor; and the said corporation shall pay for said plant the original cost of said plant with interest thereon at six per cent. per annum from the time that gas is first supplied to consumers in the city of Chatham; and shall from and after the purchase of said plant take from the said company all natural gas consumed by the inhabitants of the city of Chatham at the rate of twelve and a half cents per thousand cubic feet.

"The municipal corporation of the city of Chatham hereby covenant and agree that in consideration of the premises, and in consideration of the said company supplying sufficient gas free of charge to heat the civic buildings aforesaid, that they, the said municipal corporation of the city of Chatham, will not for the space of ten years from the execution of this agreement grant any right or privilege to any other company, body corporate, person or persons whatsoever to lay any pipe or pipes for the purpose of supplying fuel gas within ten feet of the mains or service pipes of the Standard Oil and Gas Company of Essex (Limited), their successors or assigns, or cross the mains or service pipes of the said company at a distance nearer than ten feet from said mains or service pipes."

Evidence was given that while negotiations were pending and the terms of the contract were being discussed between a committee of the city council and Mr. Cowan, representing the gas company, Mr. Douglas, as solicitor for the council, endeavoured to have the tenth clause of the agreement enlarged in favour of the city by making the gas company responsible for any loss or damage the city might sustain. But Mr. Cowan, both before the committee and the council, would not assent to the company being liable except for its own acts. And as to the expropriation clause (clause 15), Mr. Douglas said that before the committee, and likewise when discussed by the council, he urged that the clause should be amended so that the gas company

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MacMahon,
J.

Judgment. would only be entitled to the value of its works at the time
MacMahon, of the expropriation thereof by the city, with ten per cent
J. added—being the general statutory provision. Mr. Cowan would not consent to the change being made, and, if insisted upon, he said the negotiations could be considered at an end.

The professional misconduct charged in the concluding paragraph of the article is that the plaintiff as county crown attorney prosecuted a man named Whitehead, who had, during the progress of some works authorized by the city, removed some boundary monuments erected by the city after a survey which had been confirmed by Act of Parliament. The mayor of Chatham complained of Whitehead's conduct to the plaintiff, as solicitor for the city, and as county crown attorney, and he through a police officer caused an information to be laid against Whitehead, who at the General Sessions pleaded guilty, he being prosecuted by the plaintiff, acting in his capacity as county crown attorney.

In the article complained of the writer disapproved of Mr. Douglas' action—or rather want of action—in connection with the agreement between the gas company and the city of Chatham, but no base, sordid, or wicked motives are imputed to him. Mr. Hutchinson, the editor of the "Planet," stated that although present at the meeting of the city council when the agreement was discussed, Mr. Douglas, as city solicitor, did not point out to the council the objectionable features of the expropriation clause, and that he did not urge the enlargement of the indemnity clause in favour of the city. He said that he also derived information on which the article was based from members of the city council who objected to the agreement as presented to the council. Mr. Hutchinson's evidence as to what took place at the meeting of the council was in a measure corroborated by Mr. Arnold Lewis, a member of the council and a lawyer.

In criticising the plaintiff's conduct in relation to the prosecution of Whitehead, Mr. Hutchinson said he relied on

information derived from the reporters of the police court' ^{Judgment.} news attached to the newspaper; but no inquiry was ^{MacMahon,} made by the editor as to the result of the trial at the ^{J.} Sessions; and he was not aware when writing the article that Whitehead had pleaded guilty to the indictment. There is no doubt this part of the article is capable of bearing the imputation of professional indelicacy on the plaintiff's part in prosecuting a servant of the corporation on a criminal charge, while acting in the dual capacity of city solicitor and county crown attorney.

The defendant was absent from Chatham when the article was published, and stated he was ignorant of its intended publication. And both he and Hutchinson denied any malicious motive existing against the plaintiff.

There cannot be a valid assertion of "fair criticism" in relation to the conduct of a public man where the criticism is not based on facts. As said by Chief Baron Palles in *Lefroy v. Burnside* (1879), Ir. L. R. 4 C. L., pp. 565-6: "That a fair and *bond fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication, is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, in what would be a fair and *bond fide* manner on the supposition that the facts were true.

"Setting apart all question of form, the questions which would be raised at a trial by such a defence must necessarily be,—first, the existence of a certain state of facts; secondly, whether the publication sought to be excused is a fair and *bond fide* comment upon such existing facts. If the facts, as a comment upon which the publication is sought to be excused, do not exist, the foundation of the plea fails."

The law as to fair and proper criticism in regard to matters of public interest is exhaustively discussed in *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, a case

Judgment. which Bowen, L. J., in *Merivale v. Carson* (1887), 20
MacMahon, Q. B. D. 275, at p. 283, states has never been questioned.
J.

Lord Cockburn, C.J., in *Campbell v. Spottiswoode*, says, at p. 776: "A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation."

And, at p. 777, he uses this language: "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer, who is commenting upon it, makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism is not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

Mr. Justice Blackburn, in that case, at p. 781, said: "The question of libel or no libel, at least since Fox's Act (32 Geo. III. ch. 60), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another,—whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was rightly left to the jury. * * *Bona fide* belief in the truth of what is written is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment; but it

cannot in itself prevent the matter being libellous." That is, the jury, having satisfied themselves as to the existence of the facts upon which the criticism is founded, they are then to say "after reading the whole publication, whether it was written honestly and fairly, and with regard to what truth and justice required," or whether it was unfair, and so therefore libellous.

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MacMahon,
J.

Bowen, L.J., in *Merivale v. Carson* (1887), 20 Q. B. D. 275, at p. 283, points out how the question of "fair criticism" should be dealt with by the Judge in his summing up to the jury. He says: "But, among other reasons, why I prefer the view of Blackburn, J., and Crompton, J." (in *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, to that of Wills, J., in *Henwood v. Harrison* (1872), L. R. 7 C. P. 606), "is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell v. Spottiswoode* (a case which has never been questioned), to leave it unsettled, what is the standard for the jury of 'fair criticism'? The criticism is to be 'fair,' that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls 'fair,' and, although we cannot find in any decided case an exact and rigid definition of the word 'fair,' this is because the Judges have always preferred to leave the question what is 'fair' to the jury."

* * "It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism."

Judgment.**MacMahon,
J.**

Fair comment or criticism is thus defined in the 5th ed. of Stephen's Digest of the Criminal Law, 4th ed., article 274: "The publication of a libel is not a misdemeanour if the defamatory matter consist of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

"A fair comment is a comment which is either true, or which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care and on reasonable grounds.

"Every person who takes a public part in public affairs submits his conduct therein to criticism"

But under our Criminal Code, 55 & 56 Vict. ch. 29, sec. 292 (D.): "No one commits an offence by publishing any defamatory matter, which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit."

The way the case was put before the jury by the learned Chief Justice, in his lucid and comprehensive charge, was much on the lines laid down in the judgment in *Campbell v. Spottiswoode*. He said: "There is no doubt that this article was wilfully written and inserted in the newspaper, and if you come to the conclusion that it was a libel, then it was a wrongful act, and the law implies that it was done maliciously. * * That being so, is there any justification or excuse for this article? If you find that it is not libellous, that it was not calculated to injure Mr. Douglas in his position as a barrister and solicitor, and in his position as solicitor for the city of Chatham, then there is an end of the action, and you ought to find a verdict for the defendant. But if you find it was libellous, the next question for you to determine is, does the defendant shew any justification or excuse? He does not come here and say, 'What I wrote is true in substance and in fact.' He does not pretend to say that. What he does say is this:

‘In the interests of the public it is proper that a newspaper should have the right to criticise the public conduct of a public character.’ And that is quite true. Any person has a right to criticise in a newspaper or any publication, the public conduct of a public man; but that criticism must be a fair criticism, and it must be couched in temperate language; exaggerated language cannot be used; it must be in fair and temperate language, and, above all, it must be based upon the truth. Now, the question arises here, was this a fair criticism of Mr. Douglas’ conduct as the solicitor of the city of Chatham? If it was a fair comment upon it, then the defendant would go free. If it was not a fair comment, then it is no answer to the libel at all. In order to ascertain whether it is a fair comment or not, you have to look at the facts to see whether it is based upon the truth; or see whether the party who wrote it came to the conclusion, having reasonable grounds for doing so, that it was true, and so criticised his conduct. If it was true—if the foundation of it was true, then the criticism would be proper, fair and right; but if it was based on what was false, or if the party who wrote the criticism did not honestly believe upon reasonable grounds that it was true, then it would not be a fair criticism.”

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MacMahon,
J.

Then, after discussing the question of the alleged professional misconduct charged in relation to the prosecution of Whitehead for removing the boundary monuments, the Chief Justice said: “Now, I ask you, looking at that whole article, can you say whether or not that was a fair criticism of Mr. Douglas in his capacity as city solicitor, or as a barrister and solicitor practicing in the city of Chatham? If you think it was a fair criticism, then the defendant is entitled to your verdict, because a fair criticism rebuts the presumption of malice, it rebuts the presumption of inference of malice that the law draws from the wilful publication of a libel. As I have told you, if a man intentionally, wilfully, publishes a libel of another, the law implies that he does it maliciously. If it is shewn in this case that this article was a fair comment

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MacMahon,
J.

on Mr. Douglas' conduct as city solicitor, then it would rebut the inference of malice, and the defendant would be entitled to your verdict. However, in order to be satisfied that it is a fair criticism of a public man in a public capacity, such as Mr. Douglas as city solicitor, you have to be satisfied that it is founded upon truth, or that at all events having reasonable grounds for so doing, the defendant believed in the truth of it."

Having regard to the charge and to the fact that the article complained of related to a matter of public interest, we are called upon to consider what case has been made for a new trial.

Odger on Libel and Slander, 3rd ed., p. 614, says: "A new trial will, however, be granted when the matter complained of is clearly libellous, and there is no question as to the fact of publication or as to its application to the plaintiff, and yet the jury have perversely found a verdict in favour of the defendant, in spite of the summing up of the Judge: *Levi v. Milne* (1827), 4 Bing. 195; *Hakewell v. Ingram* (1854), 2 C. L. R. 1397."

In *Hakewell v. Ingram*, 2 C. L. R. (1854), where a new trial was granted, at p. 1400, Jervis, C. J., said: "There is no technical rule to prevent us from applying" (in an action of libel) "the ordinary practice of reviewing the decision of the jury, when they have come to a wrong conclusion."

And Crowder, J., said, "I agree with the rest of the Court as to the construction of the statute: that in all cases of libel, as in other cases when the jury have miscarried, the Court may authorize a new trial; but the Court ought to be slow to interfere in cases of libel, and they ought not to grant a new trial unless they see very clearly that the jury have miscarried."

Maule, J., while concurring in what was said by the other members of the Court as to the effect of the Act, 32 Geo. III. ch. 60, was against granting a new trial in that particular case.

The article on which that action was founded was a gross libel. It began by dealing with the want of some efficient

protection for married women, and the writer mentioned two cases as shewing the necessity for legislation; one case being described as that of a husband who acted towards his wife like a sot and a brute; and then proceeded: "The other * * is that of Mrs. H. (meaning the wife of the plaintiff), who having been restored to the protection of her husband by a decree of the Ecclesiastical Court, found her misery so aggravated by the restitution of her conjugal rights, that she was compelled to resort to the police court for the little help" the law gives. And it concluded by saying that the law did not meet such cases; and that the condition of woman, when the brute intervenes, is more oppressive than that of the negro.

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MacMahon,
J.

In *Levi v. Milne* (1827), 4 Bing. 195, where the Court granted a new trial, the jury before whom the action was tried inquired whether a shilling would carry costs, and being answered in the affirmative, found a verdict for the defendant.

Park, J., at p. 200, said the publication in that case was a gross and scandalous libel; that the jury had decided against their conscience, because if a shilling would not have carried costs it is plain they meant to have found a verdict to that extent at least for the plaintiff.

Odger on Libel and Slander (3rd ed.), at p. 613, says: "In the absence of any misdirection, the Court will rarely interfere to set aside a verdict, or grant a new trial on the ground that the verdict was against the weight of evidence; they will not do so unless the verdict was one which no reasonable men could have found." And at p. 614: "Unless the jury are manifestly wrong, unless the Court can say with certainty that there has been a miscarriage of justice, no new trial will be granted."

In *Saxby v. Easterbrook* (1878), 3 C. P. D. 339, at p. 342, Lord Coleridge, C. J., said: "Libel or no libel, since Fox's Act, is of all questions peculiarly one for the jury."

In *Odger v. Mortimer* (1873), 28 L. T. N. S. 472, where the defendant published of the plaintiff, a well-known public character (amongst other things), "that he was a demagogue

Judgment. of the lowest type ; half booby, and half humbug, a political
MacMahon, cheap Jack who would be a political sharper if he had
J. brains enough." And also, "I" (the plaintiff) "have any quantity of bottled-up abuse, treason and riot. I will exchange the whole lot for any permanent appointment with £250 per annum and upwards. George Odger." The jury having found a verdict for the defendant, on a motion to set aside the verdict as being against the weight of evidence, it was urged that the private honour and honesty of the plaintiff had been attacked in the alleged libels.

Bovill, C. J., in that case said, at p. 473 : "I am clearly of opinion that the questions in this case were questions for the jury, in whom the law has placed the power of deciding the question of libel or no libel. It is only in cases where the Court can see that the jury are clearly wrong that the Court should interfere. Mr. Odger complains that his honour and honesty have been attacked, and if we could see clearly that this has been done, we might interfere for his protection ; but, as a matter of fact, we see nothing of the kind. The jury, in considering their verdict, would look at all the circumstances, and the circumstances point to this—that Mr. Odger is essentially a public man. This being so, editors of public newspapers may comment in the strongest possible way upon what he says and does in that character."

Grove, J., said : "If there be a ground of action with which the Court should hesitate to interfere with a jury more than any other, that ground of action is libel. It is now the law that libel or no libel is for the jury, and the Court should not interfere, unless the ground for interference be overwhelmingly strong."

Denman, J., said : "I am of the same opinion, on the ground that the Court would be interfering in a very mischievous way with the functions of the jury by granting the rule. Generally speaking, the Court can only say of a document, whether it can be a libel, and it is then for the jury to say whether it be so or not ; for the jury are

guardians of freedom of public comment as well as of private character. The plaintiff here is emphatically a public man, and as such is *primâ facie* the proper subject of public comment. It was for the jury to say whether the comment went beyond what was fair and right."

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MacMahon,
J.

Honyman, J., concurred.

In *Metropolitan R. W. Co. v. Wright* (1886), 11 App. Cas. 152, at p. 154, Lord Herschell, L. C., said: "The case was one unquestionably within the province of a jury; and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find."

And Lord Fitzgerald said, at p. 155: "In this case there was evidence given at the trial on both sides, and on all the issues, proper to be submitted to and considered by the jury. * * If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of 'perversity,' and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory but unreasonable and unjust."

And Lord Halsbury said, at p. 156, "If reasonable men *might* find (not 'ought to,' as was said in *Solomon v. Bitton* (1881), 8 Q. B. D. 176), the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges."

And in *Phillips v. Martin*, (1890), 15 App. Cas. 193, the headnote is: "A verdict of a jury will not be disturbed as against evidence or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find."

Bennett v. Australian Newspaper Co. (Limited), [1894] A. C. 284, was an action for libel where a jury of four by a majority found a verdict for the defendants: the Superior Court of New South Wales set aside the verdict, and ordered a new trial. The Judicial Committee of the Privy Council discharged this order, holding that there was evi-

Judgment. dence on which the jury could have found that the defend-
MacMahon, tant had not reflected upon the plaintiff's character.
J.

Lord Herschell, L. C., in delivering the opinion of the Judicial Committee, said, at p. 289: "The question therefore is whether in all these circumstances it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character, or even upon his conduct in relation to the newspaper. The jury have so found, and their lordships are of opinion that it would be exceeding the legitimate function of the court if the verdict were set aside and a new trial ordered: that the court would then in reality be taking upon itself the function which the law has committed to the jury, of looking at the alleged libellous matter as a whole, and determining whether it is published of and concerning the plaintiff, and whether it bears the innuendo which the plaintiff seeks to attach to it."

In *Spencer v. Jones* (1897), 13 Times L. R. 174, Lord Esher, M. R., said: "The court did not desire or intend to make juries infallible. At the same time, if there was evidence to go to the jury, it was almost impossible, except in extreme cases, to set aside a verdict as being against the weight of the evidence."

Lord Justice Chitty, at p. 175, said he "took the rule to be that, to justify the court in granting a new trial on the ground that the verdict was against the weight of the evidence, the verdict must be either perverse or one which twelve reasonable men could not properly find. Weight must also be given to the remarks of Lord Halsbury in the above case" (*Wright v. Metropolitan R. W. Co.* (1886), 11 App. Cas.), "to the effect that the Judges ought not to substitute their own opinions as to the facts for that of the duly constituted tribunal appointed to decide the facts. The phrase 'perverse' seemed to him to be merely a very aggravated form of unreasonableness. He could not say that the verdict here was either perverse or one that twelve reasonable men could not properly have arrived at."

And in *Brown v. Commissioners of Railways* (1887), 13 App. Cas. 133, it is said where there is evidence on both sides properly submitted to a jury the verdict of the jury once found ought to stand.

Judgment.
MacMahon,
J.

The power of the court to set aside verdicts in actions of libel was discussed by Lord Blackburn in *Capital and Counties Bank (Limited) v. Henty* (1882), 7 App. Cas. 741, at pp. 775-6, where he says: "But though no doubt the court has more power to set aside verdicts in civil cases, there is no reason why the functions of the court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

"It certainly had always been my impression that there was a difference between the position of the prosecutor or plaintiff, and that of the defendant. The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published as to convey the libellous imputation. If the defendant can get either the court or the jury to be in his favour he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him."

The learned Chief Justice told the jury several times during the course of his summing up, that any criticism on the acts or conduct of the plaintiff must have been based upon the truth, and with that direction it was then for them to say, having regard to the evidence of Hutchinson and Arnold on the one side, and of the plaintiff, and Henry Smith, and Cowan on the other, as to what took place at

Judgment.
MacMahon,
J.

the council meeting, whether the statement in the "Planet" was true that the plaintiff did not during the meeting urge upon the council a modification of what was called the obnoxious features of the agreement which the plaintiff admitted was not so favourable as he thought it should be. And although during the charge to the jury the expression "whether the defendant had reasonable grounds for believing that the statement was true and so criticised the plaintiff's conduct" was used, the charge must be taken and considered as a whole, and was not considered by counsel as objectionable, and no objection was taken to it. The ground of misdirection on which the motion was mainly urged is therefore untenable: *Wills v. Carman* (1888), 17 O. R. 223.

Since the Criminal Code came into force the courts might properly hold that the rule of law in civil cases for libel should conform to that laid down by the Code as to criminal cases for libel. For, as pointed out by Lord Blackburn in *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, at p. 775, in England "the law in civil actions for libel, was the same as it had been expressly enacted it was to be in criminal proceedings for libel."

The verdict might properly have been in the plaintiff's favour. But where the question of libel or no libel,—that is, whether the article complained of was calculated to injure the plaintiff in his profession,—is one for the jury, we must, in order to disturb the verdict, say that the verdict was such that "a jury viewing the whole of the evidence reasonably could not properly find."

And although the verdict might well have been the other way, that of itself constitutes no ground for disturbing it. And were the Court to set aside the verdict and grant a new trial, it would in effect be saying that on all the facts the jury as reasonable men ought not to have found a verdict for the defendant, and we would be virtually usurping the functions of the jury in a case in which the facts are essentially for them.

I have not dealt with the other ground—the improper

reception of evidence,—because the evidence objected to was merely for the purpose of shewing that the defendant in writing the article was not actuated by malice, and related to the refusal of the defendant to publish letters of correspondents criticising the plaintiff's conduct as city solicitor, and no substantial wrong could, having regard to the summing up, have resulted from the admission.

The motion, in my opinion, should be dismissed with costs.

G. F. H.

Judgment.
MacMahon,
J.

[DIVISIONAL COURT.]

RE BRITISH MORTGAGE LOAN COMPANY OF ONTARIO.

*Assessment and Taxes—Municipal Corporations—Court of Revision—
Appeal to County Judge—Assessor—Right to Appeal.*

The appeal from the Court of Revision to the County Judge in a case where such Court allows an appeal by the party assessed, against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but must be by the corporation itself.

Judgment of ARMOUR, C.J., reversed, MEREDITH, C.J., dissenting.

THIS was a motion by way of appeal by The British Mortgage Loan Company of Ontario from an order of the Chief Justice of the Queen's Bench dismissing a motion made by the company for an order prohibiting James Sharman, assessor of the city of Stratford, from prosecuting, and John Augustus Barron, Esquire, the Judge of the County Court of the county of Perth, from hearing an appeal by Sharman to the Judge from the Court of Revision of the city of Stratford, in respect to the assessment of the company.

The learned Chief Justice was of the opinion that under the statute every ratepayer had a right of appeal to the County Judge, and that a ratepayer was not disqualified

Statement. by reason of the fact of his being an assessor: that the substance and not the form of the notice was to be looked at, and as the assessor was a ratepayer he had the right of appeal: that there was nothing in the statute which forbid the assessor appealing or which put him in such a position that it would be improper to allow him to appeal; and he refused the application with costs.

On May 10th, 1898, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ., *W. H. Blake*, supported the motion.

Idington, Q. C., contra.

July 15th, 1898. MEREDITH, C. J.:—

The sole question raised upon this appeal is whether the assessor in his capacity as such, or as a ratepayer or municipal elector of the municipality, was entitled to appeal from the decision of the Court of Revision in favour of the company upon an appeal by the latter against its assessment to the Court of Revision.

The right of appeal is given by sec. 75 of the Assessment Act, R. S. O. ch. 224, but the section is silent as to the person or body by which the appeal may be brought.

It was contended by counsel for the appellant that the right to appeal is confined to the parties to the original appeal—that to the Court of Revision; and that inasmuch, as, as it was argued, the assessor was not and could not be a party to that appeal, it was not competent for him to appeal to the Judge from the decision of the Court of Revision.

The provisions of the Act as to appeals are by no means clear and explicit, and the machinery provided in express terms is very incomplete, much being in both cases left to be supplied or inferred from what is expressly provided, taken in connection with the general scheme and purpose of the enactment.

The provisions as to the persons who may complain to

the Court of Revision, and the mode in, and time within, which they are to do so, are plain enough; but as to what is doubtless the largest class of complaints, that by persons complaining of errors or omissions with regard to themselves, nothing is said as to who is to be deemed the respondent; and, upon the argument of this appeal, it was strongly urged that, whoever else may be, the assessor may not; and it was on the other hand contended that he and he only is and must be the respondent, and that neither the corporation itself nor the ratepayers or municipal electors generally other than the complainant, the only other persons who were suggested as possible respondents were, according to the true construction of the Act, to be deemed to occupy that position.

Judgment.

Meredith,
C.J.

I do not see why, upon principle, the assessor may not well be the respondent in the appeal to the Court of Revision, and entitled, if dissatisfied with its decision, to appeal from it to the Judge.

Though appointed by the municipal council, he is a statutory officer charged with the duty, among other things, of entering upon the assessment roll the taxable property within the municipality, the value of it, and the persons liable to be rated in respect of it; his duties are performed in accordance with the directions of the Assessment Act; he is not in any way subject in the discharge of these duties to the direction or control of the municipal council; and he testifies to the due performance of them by an affidavit or solemn affirmation which accompanies the assessment roll when returned to the clerk of the municipality: section 55.

His roll is not, however, conclusive, and a tribunal is provided for the hearing of appeals against it; that tribunal is the Court of Revision; and in all municipalities except cities it consists either of the members of the council or of five members of that body appointed by it, and it was not until quite recently that the exception to the general rule existed in the cases of cities.

The municipality is treated, therefore, as it seems to

Judgment.
Meredith,
C.J.

me, not as the body making the assessment by the assessor as its officer, but as an independent body to determine between the assessor and the persons rated as to the correctness of the assessment, and theoretically, at all events, the corporation as such, is not, except in rare cases, concerned in the questions raised upon an appeal because the only effect of a change in the roll as returned by the assessor, as far as it is concerned, is upon the amount of the rate to be struck to provide for the expenditures necessary to be incurred; the amount to be contributed by each ratepayer, in other words, the incidence of the tax rate being primarily, at all events, a matter between the ratepayers themselves as such.

It would appear to me, therefore, that where an appeal is given against the rating upon the assessment roll, the parties to it would naturally be the complainant and the assessor, the former attacking and the latter defending the assessment made, except in the cases where the complainant invokes an interference with some other ratepayer or person, as in the case of an appeal under sub-sec. 3 of sec. 71, in which case that other ratepayer or person would also be properly a respondent in the appeal.

The language of some of the provisions of the Act dealing with appeals to the Court of Revision and to the Judge seems to me to indicate that the Legislature contemplated that the assessor was, in the cases to which I am referring, to be a respondent in the appeal.

One of these provisions is contained in sub-sec. 15 of sec. 71, which speaks of the Court of Revision, after hearing the complainant and the assessors and any witness adduced, and if deemed desirable the person complained against, determining the matter and confirming or amending the roll, and is, I think, inconsistent with the idea of the municipality, or the ratepayers or municipal electors generally, being parties to the appeal, for in that case one would expect to find, if not a provision that they should be heard, certainly not one which impliedly, at all events, excludes them from being heard.

Another of these provisions is sec. 79, which authorizes the Court of Revision and the Judge to order the assessor to pay the whole or part of the costs of the appeals to them respectively.

Judgment.
Meredith,
C.J.

It was, however, argued that the provisions of sub-sec. 18 of sec. 71 are inconsistent with the idea of the assessor being a party to the appeal, because, it is said, provision being there made for the assessor being the complainant, in cases where the Court extends the time for making complaints in consequence of there being palpable errors in the roll which require correction, indicates that without such a provision the assessor could not be the complainant. That may, I think, for the purpose of the argument be conceded; but the effect of it is to shew only that the assessor may not, except in the cases with which the sub-section deals, appeal against the assessment made by himself; but it in no way affects the question in issue here, which is not as to the right of the assessor to appeal against the assessment made by him, but his right, in the event of that assessment being altered by the Court of Revision, to appeal against the decision of that Court with a view to having the assessment made by him restored.

It was also pointed out that no provision is made for service of notice of the complaint on the assessor, the notice being required to be given by the person complaining to the clerk or assessment commissioner, which it was said is inconsistent with the view that the assessor is a respondent. But I think the force of that argument is taken away when it is pointed out that even where the complaint affects third persons, who certainly must be respondents, the complainant is not required to serve any-one but the clerk or assessment commissioner with the notice of his complaint, the duty of notifying the assessor and the third person affected being imposed upon the clerk.

Having regard to all these considerations, I have come to the conclusion that the assessor was a party respondent in the appeal of the appellant company to the Court of

Judgment. Revision ; and it follows, if I am right in that view, that it was competent for him to appeal as he did from the decision of the Court of Revision to the Judge.
Meredith,
C.J.

The result would be the same if the respondents in the appeal to the Court of Revision were the ratepayers or municipal electors generally, as the assessor was both a ratepayer and a municipal elector.

Although the reasoning by which I have reached the conclusion to which I have come leads possibly to the result that the assessor, if a respondent at all in appeals under sub-section 1, must be the sole respondent, it is unnecessary for the disposition of this appeal to express any opinion upon that point, and I refrain from doing so.

The appeal should, in my opinion, be dismissed with costs.

The majority of the Court have come to a different conclusion ; but after the most careful consideration of the arguments in favour of their view, I am unable to accede to it, or to satisfy myself that the Legislature can have intended that one of the parties to the appeal should sit in judgment in their own case, which would be the result if the municipality is to be deemed the respondent in every appeal under sub-section 1. It is quite true that in form the Court of Revision is a different body from the council though the latter consist of but five members, but in substance and in fact it is, I think, the same body.

ROSE, J. :—

It is the duty of the council to appoint assessors : Municipal Act, sec. 295 ; and it may prescribe regulations for governing them in the performance of their duties : sub-sec. 3.

It is the duty of the mayor and of the assessment commissioner, if there be an assessment commissioner, to see that the assessors perform the duties mentioned in sec. 13 of the Assessment Act.

The power to appoint includes the power to remove : Interpretation Act, sec. 26.

It follows that the assessor is the servant of the council to perform the duties assigned to him.

Judgment.

Rose, J.

The Court of Revision, whether it consists of three members (as in cities) or of the whole council, in municipalities other than cities when the council consist of not more than five members, is a Court with judicial functions, and its decisions are final and binding subject to the appeal provided for by sec. 75 of the Assessment Act, secs. 62 to 74. It is independent of and distinct from the municipality or council, and is in no sense under its control. Each member is required to take an oath of office : section 64.

In cities, no member of the council may be a member of the Court of Revision : sec. 62, sub-sec. 3.

The duty cast upon the Court is to try all complaints in regard to persons :

(a) Wrongfully placed upon the roll ; (b) Wrongfully omitted from the roll ; (c) Assessed at too high a sum ; and (d) Assessed at too low a sum : section 68.*

Section 71 provides for appeals by : Any person complaining of an error or omission in regard to himself :

Sub-section 1. (a) As having been wrongfully inserted in the roll ; (b) As having been wrongfully omitted from the roll ; (c) As having been undercharged ; (d) As having been overcharged.

Sub-section 3. A municipal elector who thinks that : (a) Any person has been assessed too low ; (b) Any person has been assessed too high ; (c) Any person has been wrongfully inserted ; (d) Any person has been omitted from the roll.

The procedure following can, therefore, relate to the foregoing only. It will be observed that the draftsman has not been careful to use exactly the same language in both sections in describing the cases in which appeals may be had, but it is substantially the same.

The procedure is as follows :—

In each case, notice in writing is given by the person complaining to the clerk of the municipality, or assessment commissioner, if any there be, and to no one else.

Judgment.

Rose, J.

Under sub-section 1, the person complaining is to "give a name and address where notices may be served by the clerk as hereinafter provided," while by sub-section 3 the clerk, in appeals under that sub-section, is to "give notice to such person" (*i.e.*, the person complained against) "and to the assessor, of the time when the matter will be tried by the Court of Revision."

By sub-section 4 it is provided that no alteration shall be made in the roll unless under a complaint formally made according to the above provisions.

There is thus no provision for any appeal by or on behalf of the municipality to the Court of Revision, nor should there be, for if no ratepayer complains against his own or another ratepayer's assessment the municipality is not concerned, as the taxes will be apportioned on the basis of the assessment, and the required amount raised, no matter how apportioned among the ratepayers individually.

The clerk is, by sub-sec. 7 of sec. 71, required to give public notice, by advertisement in some newspaper, of the time appointed for the sittings of the Court; and by sub-section 9 serve a notice in the prescribed form on each person complained against.

By sub-section 8 the clerk is required to cause to be left at the residence of each assessor a list of all the complaints respecting his roll; but, except in the case provided for by sub-section 3, he receives no personal notice of the time of the sitting of the Court.

By sub-section 14 provision is made, in the case of a complaint of being overcharged, for receiving a declaration, in the form provided, by the complainant or his agent; and, if the Court is dissatisfied with the declaration, for hearing witnesses on oath. But in such a case the assessor is neither notified personally of the time appointed for hearing the appeals, nor is it said that he is to be heard before the Court.

By sub-section 15 it is provided that "in other cases" the Court may hear the complainant, the assessor or assessors,

and any witnesses adduced, and, if desirable, the person complained against.

Judgment.

Rose, J.

This would include complaints under sub-section 1 (a), (b) and (c), and under sub-section 3 (a), (b), (c) and (d). In cases (a), (b) and (c) under sub-section 1, the assessor may be heard, although not personally served with notice of the date of the sittings of the Court, and in the remaining cases he may be heard after having received notice.

Sub-section 16 is the only section which in any sense treats the complainant, assessor and person complained against as a party. It is as follows: "It shall not be necessary to hear upon oath the complainant or assessor, or the person complained against, except where the Court deems it necessary or proper, or where the evidence of the person is tendered on his own behalf or required by the opposite party;" but whatever construction might be placed upon it standing alone, taken with the other sections of the Act, it cannot, I think, give the assessor such a status.

Sub-section 18 provides for an appeal by the assessor to correct palpable errors. As this is a sub-section of 71, and as sub-section 4 says that no alteration shall be made in the roll unless under a complaint formally made according to the above provisions, it is certainly open to argument that the palpable errors must be such as appear when the roll is brought before the Court on an appeal under the preceding provisions of section 71; and this is supported by the language of sub-section 18, which may indicate that the errors are such as are made to appear to the Court after the appeals are in and the time for appealing has expired.

I do not see, however, that we are required to consider this sub-section further in the present case.

By sub-section 20 the Court of Revision and the Judge of the County Court are empowered "to re-open the whole question of the assessment," to correct errors or omissions; but this only "in case any person appeals."

Sub-sec. 3 of sec. 74, expressly gives an appeal to the municipality against the decision or apportionment of the Court of Revision under sub-sections 1 and 2. From the

Judgment. use of the words "decision" and "apportionment" it is not quite clear whether the right of appeal exists from both a decision under sub-section 1 and an apportionment under sub-section 2, or from the latter only.

Rose, J.

Thus we see that under sub-sec. 18 of sec. 71, provision is made for an appeal by the assessor in a particular case, and by sub-sec. 3 of sec. 74, provision is made for an appeal by the municipality; and these, as far as I see, are the only cases where either is named as an appellant.

Section 75 is the one providing for appeals to the County Judge. It says: "An appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to said Court, but also against the omission, neglect or refusal of said Court to hear or decide an appeal." As nothing is said as to who may appeal, I take it that it must be one of the parties to the original appeal.

Sub-section 2 provides for notice of appeal being served by "the person appealing" upon the clerk or assessment commissioner. By sub-section 4 the clerk is to "give notice to all the persons appealed against in the same manner as is provided for giving notice on a complaint under section 71."

We have seen that alone under sub-sec. 3 of sec. 71 is there any "person complained against," and that is the person whose assessment is attacked by a municipal elector, and such person is not the assessor. See the following expressions: "To such person and to the assessor": sub-section 3; "person with respect to whom a complaint has been made": sub-section 9; "complainant and the assessor or assessors, and any witness adduced, and, if deemed desirable, the person complained against": sub-section 15. Where the complaint is made under sub-sec. 1 of sec. 71, it is spoken of as a complaint not against the assessor but against his "return": sub-section 4.

Assume, therefore, that the Court of Revision has dismissed an appeal by an elector against some other person, and an appeal has been made by such elector to the Judge, notice of appeal would be given by him to the clerk and

the clerk would notify the person appealed against, *i.e.*,
“the person with respect to whom a complaint has been
made” or “the person complained against.” The parties
to the appeal in such a case would be “the person appeal-
ing, the clerk or the assessment commissioner,” and the
“person appealed against,” and no one of these is the
assessor.

Judgment.
Rose, J.

I suppose it will be admitted that service is made upon
the clerk as representing the municipality, for I find that by
section 79 the clerk may be ordered to pay costs as “clerk
of the municipality,” which I take it does not mean that
it is intended that he should be ordered to pay them per-
sonally.

If, in the case I have put, the appeal has been allowed by
the Court of Revision, then the person appealing would be
the person appealed against below, and the person appealed
against before the Judge would, I suppose, be the appellant
below. This language would not be strictly accurate, as
what would be appealed against would be the decision of
the Court of Revision. If it be held that because the
assessor's return was complained of before the Court of
Revision, therefore, the assessor was a person appealed
against, then it would follow that when the decision of
the Court of Revision was appealed against to the Judge,
the Court of Revision would be the person appealed
against. It would follow that in an appeal under sub-sec.
1 of sec. 71, the assessor would not be a person appealed
against under sub-sec. 4 of sec. 75. In each and every case
the clerk is notified, and the municipality has the right, and
it is manifestly its duty, to appear to see that the work of
its servant, the assessor, has been properly done, to support
it before the Court of Revision, if proper so to do, and if
errors or omissions have occurred, to have them remedied
under sub-sec. 20 of sec. 71, so that the assessment may be
fair and just. And if the Court of Revision gives a deci-
sion which appears improper, it is manifestly the duty of
such municipality to carry such decision before the Judge
to have it corrected on appeal. If it is the assessor, as

Judgment.

Rose, J.

assessor, and not the municipality, on whom such duty lies, then, if the assessor should through any motive, proper or improper, choose to say that in his opinion the decision of the Court of Revision was correct and that he would not appeal, the municipality would be helpless, and the servant would be the master. Assume that the decision of the Court of Revision interfered with the assessment, and it seemed to the municipality to be a right decision, could the assessor say to the municipality that to him it seemed erroneous and that he would appeal whether the municipality wished it or not?

But it was urged that because under section 79 costs might be imposed by the Court of Revision on an assessor, he must be a party and have the right of appeal. It seems to me that the language of that section is satisfied by applying it to the case where clearly he is a party, *i.e.*, where he is authorized by sub-section 18 to complain against his own assessment, and where he might in some cases be justly ordered to pay costs.

The fact that the process for enforcing payment of costs ordered by the Court of Revision is by a distress warrant under the hand of the clerk of the municipality and the corporate seal, would be no more anomalous if costs were ordered to be paid by the municipality than if ordered to be paid by the clerk. It may be that there is an omission to provide for payment of costs by the municipality; but other omissions might be pointed out shewing that the clauses were not all framed at the same time by the same person to carry out a complete and uniform scheme.

Section 84 provides for an appeal where large amounts are involved, and under its provisions the city of Toronto was the appellant to the Court of Appeal in *Re Toronto Railway Company Assessment* (1898), 25 A. R. 135; and, I am told by the Judges of that Court, that no question was raised as to its right to appeal, although there is no special provision authorizing the municipality to appeal.

I cannot accede to the argument that each ratepayer or municipal elector has the right to appeal from the decision

of the Court of Revision in every case affecting all the ratepayers. In the first place it would be highly inconvenient; and in the second place, as I have pointed out, sub-sec. 4 of sec. 71, declares that "no alteration shall be made in the roll unless under a complaint formally made according to the above provisions," i.e., those contained in section 71, so that no one could appeal to the Judge in the first instance. There are of course the special provisions giving the right of appeal in the cases I have pointed out. And then, as I have said, where the statute gives the right to appeal simply without stating by whom the right may be exercised, it follows that it must be to the unsuccessful party below.

Judgment.
Rose, J.

For these reasons I am of the opinion that the assessor, as such, has no right to appeal from the decision of the Court of Revision to the Judge, nor has he such right as a ratepayer or municipal elector; and I am further of the opinion that the municipality is a party to the appeal to the Court of Revision and as such has a right of appeal to the Judge.

In my opinion this appeal should be allowed and the order for prohibition be granted with costs here and before the learned Chief Justice of the Queen's Bench to be paid by the assessor.

MACMAHON, J., agreed with ROSE, J.

Appeal allowed with costs.

G. F. H.

TYTLER V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Jurisdiction—Negligence in Another Province—Railways—Cause of Action—Service of Writ.

A writ of summons in an action to recover damages against a railway company for negligence alleged to have occurred in British Columbia, was issued out of the High Court of Justice for Ontario, and was served on the defendants' claims agent in Toronto, Ontario. The head office of the railway, incorporated by Dominion legislation, was in the Province of Quebec, but the company carried on business in Ontario through which its railway ran, and where large numbers of its officers and servants resided :—

Held, that the action was properly brought in Ontario, and the service of the writ therein was valid.

Statement. THIS was an action brought by the plaintiff, as executor of Archibald Smith, deceased, against the Canadian Pacific Railway Company to recover damages for an accident sustained by the deceased through the alleged negligence of the defendants in not properly packing the space between the switches on their track at Donald, in the Province of British Columbia, as required by the Railway Act, 51 Vict. ch. 29, sec. 262 (D.), the space being less than five inches, whereby one of the feet of the deceased, who was engaged in the defendants' service in coupling and uncoupling cars was caught in the said space, and before he could extricate it he was run over by one of the defendants' trains and killed.

The writ in the action was issued out of the High Court of Justice for Ontario, and was served on James Wilson, the claims' agent of the company at the city of Toronto.

The defendants, by leave of the Court in addition to the defence of not guilty by statute, pleaded that the writ of summons had not been properly served, and that the High Court had no jurisdiction to entertain the action, the cause of action having arisen in the Province of British Columbia, and also by leave of the Court, moved for judgment on the pleadings under Rule 259.

The plaintiff made an affidavit, which was filed on the motion. It set out that the deceased was for many years

a resident of the county of York, in the Province of Ontario, prior to his going to British Columbia; and that at the time of his death his domicile was still in the county of York, namely, at the town of Toronto Junction; that his widow and step-daughter had always been domiciled at the said town of Toronto Junction; that the defendants had their head office in the city of Montreal, in the Province of Quebec; and that in the Province of Ontario, they had a general superintendent and other officers looking after and managing the affairs of the company in Ontario, where they transacted the general business of the company done in Ontario, and whose office was at the city of Toronto, where the affairs of the Ontario division were transacted and controlled; that the defendants operated in British Columbia a line of railway having a head office in Winnipeg, in the Province of Manitoba, which had general control over the division west of Fort William, which included British Columbia; and that there were no head offices in British Columbia controlling the affairs of the company therein as there were in the Provinces of Ontario and Manitoba; that after the death of the said Archibald Smith his body was sent to West Toronto Junction, and he was buried in the county of York; and that letters of administration were granted to the plaintiff by the Surrogate Court of the county of York.

The motion was argued on June 2nd, 1898, before MEREDITH, J.

Robinson, Q. C., and Aylesworth, Q. C., for the motion.
Tytler, contra.

June 29th, 1898. MEREDITH, J.:—

The generally accepted rule of that which, for want of a better expression, is called international law, and the rule of the common law of England, undoubtedly required, with few exceptions, that the creditor should follow his debtor when seeking relief against him in courts of jus-

Judgment. tice, and denied jurisdiction in the court of any country
Meredith, J. but that in which the debtor resided: the opposite of that rule of law which requires a debtor to seek his creditor and discharge his obligation wherever the creditor may be.

But obviously that does not prevent the enactment of laws at variance with such general rule, nor the enforcement of them, as far as possible, in the country which enacted them, whatever view any other country might take of such laws, or however decidedly other countries might decline to give effect to them, or to consider them valid.

The provisions for service out of the jurisdiction (rendered necessary by changed times and circumstances) so long existing in the practice of the courts of this Province, and of many countries, afford instances of municipal law departing from the general rule. Indeed, the changes of the times have been so great, the departures from the general rule so numerous and so long continued, that an appeal to it in its unmodified form is, at first sight, surprising.

In this particular case, however, it is needful to recall to memory the general rule, for the case is not one covered by any of the provisions of the law of this Province respecting service out of the jurisdiction.

The cause of action alleged arose in the Province of British Columbia. It may be that the practice there is the same as the practice here, regarding service out of the jurisdiction. If so, and if that practice is applicable to the case, an action would lie there. If not, if the matter stands as at common law, then there is no more right to sue them there than here, for the general rule gives no right of action except where the defendant resides. The right depends upon the defendant's residence. Jurisdiction here, therefore, depends on whether the defendants reside in this Province. If so, the action is, under the general rule, rightly brought here. The plaintiff needs no aid from any municipal law permitting service

out of the jurisdiction ; the matter is not one in which he needs the leave of the Court to maintain his action.

Judgment.
Meredith, J.

In one of the cases, a corporation is spoken of as a foreign corporation in two senses, that is as a corporation of foreign origin, and as a corporation of entirely foreign residence. A Canadian corporation, incorporated under Federal legislation, cannot, I think, be deemed, in any of the Provinces, a corporation of foreign origin : it is incorporated under the laws of the confederated Provinces, and so incorporated in order that it may carry on business in all of them. Yet if it have not its head office, and do not carry on business, in this Province, it is, I think, for this purpose, to be deemed a foreign corporation in the other sense ; and so this Court would have no jurisdiction over it in such a case as this.

So that the question of jurisdiction here depends upon the question of fact :—Do the defendants reside in this Province ? Their head office is in the Province of Quebec, and there the plaintiff might have sued, if there is nothing in the laws of that Province to prevent it.

But a corporation is said to reside where its business is carried on, and so it may reside in more than one Province or country. And that being so, one can hardly doubt that defendants reside in this Province, where many hundreds of miles of its railway are, where its interests are perhaps greater than in any other Province, and where many millions of dollars of its capital are invested, and many hundreds of its officers and servants live, and so where the plaintiff's claim could readily be enforced.

The locality of its head office is not the only test of its residence ; if it were a corporation could have but the one place of residence. I speak of residence for the purpose of conferring jurisdiction under the general rule, for, for some purposes, it may, no doubt, be that its head office is to be taken as its one place of domicile : see the Companies Act R. S. C. ch. 19, secs. 61 and 62.

The more recent cases have determined that in circumstances such as of this case a foreign corporation would

Judgment. have a sufficient residence in this Province to confer jurisdiction on this Court, jurisdiction under the general rule of international law and of the common law : see *Haggin v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519 : see also *County of Wentworth v. Smith* (1893), 15 P. R. 372.

The cases under the Division Courts Acts are not applicable. After some difference of opinion the ultimate ruling seems to have been that the Grand Trunk Railway Company did not come within the peculiar wording of the Act permitting a summons to be issued out of the "Division Court of the division in which the garnishees carry on business;" words contemplating, it was said, one Division Court only having jurisdiction, not every Division Court in every division in which the company transacted any of its business : see *Westover v. Turner* (1876), 26 C. P. 510. And conformable to the trend of judicial opinion and of legislation in this respect, the power to take such proceedings in the several Division Courts was soon after expressly conferred by legislation.

Nor are the cases *Boswell v. Piper* (1896), 17 P. R. 257, and *Parker v. Odette* (1894), 16 P. R. 69, or the cases relied on in them, applicable, for in those cases there was only an agency of the foreign corporation in this Province.

It may be hard to draw the line with neatness and accuracy, but it may safely be said, that cases where there is a mere agency in this Province, where the residence and business are the residence and business of the agent not of the corporation, are well on one side of it; whilst cases such as this are well on the other side.

And this case is strengthened by the fact that the defendants are a corporation of, in a sense, domestic, not of foreign, origin : see *Buenos Ayres and Ensenada Port R. W. Co. v. Northern R. W. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210.

Then it was contended that under the defendants' Act of incorporation provision is expressly made for service upon them at their head office, and that that excludes

service in any other manner. But the words relied upon Judgment. are merely enabling, they may be served in the manner Moredith, J. provided for, not they must be served in that manner only.

And, besides this, I cannot doubt the power of Provincial Legislatures to provide means of serving any corporation carrying on business in the Province, so as to enable its Courts to enforce claims, within their jurisdiction against it.

Doubtless any Act, providing for incorporation, may provide means of effecting service which would be binding on all corporations created under it; but that would and could not curtail or interfere with the powers of the Provinces over legislation providing means of enforcing civil rights in its Courts.

The Consolidated Rule 159, made more effectual by confirmatory provincial legislation—The Judicature Act, sec. 129—may, therefore, apply to such a corporation as the defendants, and there is no good reason why they should be excluded from its provisions: see *Haggin v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519, and so there is no lack of jurisdiction for want of a means of effecting service.

The cases *Palmer v. Caledonian R. W. Co.*, [1892] 1 Q. B. 823, and *Watkins v. Scottish Imperial Ins. Co.* (1889), 23 Q. B. D. 285, are not applicable, for the order under which they were decided expressly excepted such cases from its effect; there is no such exception in our Consolidated Rule.

However inconvenient it may be to try the case here, there is, in my opinion, no doubt of the plaintiff's right to maintain this action. The inconvenience and expense being more to a plaintiff, who has to pay, though indirectly, the railway companies for the carriage of his witnesses, such cases as this are likely to be so few that there need be no anxiety on that account as to the indirect result of this decision. The inconvenience and expense would be greater, if, as the defendants contended, they reside in the Province of Quebec only, and if they had been sued there.

Judgment. I have dealt with the case without taking into consideration, for any purpose, the contention that the grant of letters of administration to the plaintiff, in this Province, gave a right of action here.

The point of law in question on this motion is ruled in favour of the plaintiff, with costs.

G. F. H.

REGINA V. GIBSON.

Criminal Law—Procuring Female for Prostitution—Commitment—Recital of Invalid Conviction—Duplicity—Criminal Code, secs. 185, 800—Habeas Corpus—Court of Record—R. S. O. ch. 83, sec. 1.

A commitment of the defendant to gaol recited a conviction for “unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere :”—

Held, that the commitment was bad on its face, as it recited a conviction which was invalid for duplicity and uncertainty.

The commitment, although it alleged a conviction, could not be supported under sec. 800 of the Criminal Code, because there was not a good and valid conviction to sustain it; the conviction returned being that the prisoner, at H., etc., did unlawfully procure a girl of seventeen years, I. D., to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the prisoner at L., in the State of New York, one of the United States of America; which did not come within any of the provisions of sec. 185 of the Code.

The words “a Court of Record” in the exception in sec. 1 of the *Habeas Corpus* Act, R. S. O. ch. 83, include only Superior Courts of Record, and do not include a magistrate’s Court exercising the power conferred by sec. 785 of the Criminal Code.

Statement. THE prisoner was charged before the police magistrate for the city of Hamilton with an offence against sec. 185 of the Criminal Code, which enacts that :

Every one is guilty of an indictable offence, and liable to two years’ imprisonment with hard labour, who—

(c) procures, or attempts to procure, any woman or girl to become, either within or without Canada, a common prostitute; or

(d) procures, or attempts to procure, any woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(f) procures, or attempts to procure, any woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada. Statement.

The prisoner elected to be tried summarily by the magistrate, and was so tried by him under the power conferred by sec. 785 of the Criminal Code, which is as follows:

If any person is charged, in the Province of Ontario before a police magistrate * * with having committed any offence for which he may be tried at a Court of General Sessions of the Peace * * such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

The prisoner was convicted by the police magistrate and sentenced to imprisonment and fine.

September 9, 1898. *J. Dickson*, for the prisoner, applied to ARMOUR, C. J., in Chambers, for an order for the issue of a writ of *habeas corpus* and *certiorari* in aid.

September 12, 1898. ARMOUR, C.J.:—

The prisoner in this case was charged before the police magistrate for the city of Hamilton with an offence triable at the General Sessions of the Peace, and, having elected to be tried summarily, was by him convicted and was by him sentenced to imprisonment and fine; and she now applies for a writ of *habeas corpus* under the provisions of R. S. O. 1897 ch. 83, which Act provides (sec. 1) for the issue of such a writ where a person is confined or restrained of his liberty (except persons imprisoned for debt, or by process in any action, or by the judgment, conviction or order of a Court of Record, Court of Oyer and Terminer or General Gaol Delivery, or Court of General Sessions of the Peace).

Judgment. It is unnecessary, in the view I take of the proper construction to be placed upon the words of this exception, to determine the very difficult question whether or no the Police Court of the city of Hamilton, exercising the power conferred upon it by sec. 785 of the Criminal Code, is a Court of Record.

For I think that the words "a Court of Record" are intended to include only Superior Courts or principal Courts of Record, and not inferior Courts or less principal Courts of Record, and do not include any Courts of Record inferior to or less principal than the High Court of Justice.

The authority for this view is to be found in *Gregory's Case* (1596), 6 Co. Rep. 19b, following which is *O'Reilly qui tam v. Allan* (1854), 11 U. C. R. 526.

Besides, if by the words "a Court of Record" had been intended all Courts of Record, there would have been no necessity for adding to the words "a Court of Record" the words "Court of Oyer and Terminer or General Gaol Delivery, or Court of General Sessions of the Peace," for these were all Courts of Record and would have been included in the words "a Court of Record."

In coming to this conclusion I have not overlooked the cases of *Regina v. St. Denis* (1875), 8 P. R. 16, and *Regina v. Goodman* (1883), 2 O. R. 468, but, the liberty of the subject being involved, I think that I am bound to express my individual opinion.

I therefore award the *habeas corpus* and a *certiorari* also if the applicant desires it.

I refer also to *Rex v. Steventon* (1802), 2 East 362; 2 Hale's P. C. 29; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; 31 Central L. J. 86.

The writs having been issued and a return made, *Wallace Nesbitt*, for the prisoner, moved before ROSE, J., in Chambers, on the 16th September, 1898, for an order for her discharge, upon grounds which are stated in the judgment.

J. R. Cartwright, Q.C., for the Crown, shewed cause.

October 6, 1898. ROSE, J.:—

Judgment.

Rose, J.

This was a motion to discharge the prisoner on return of a writ of *habeas corpus* and *certiorari* in aid. It was objected that the commitment was void by reason of a defect appearing upon its face, in that the conviction therein recited was not valid, being faulty for duplicity and uncertainty. The conviction recited was for "unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere." I think the conviction thus recited is invalid, for the reason suggested. Procuring of course is quite different from attempting to procure; and the second alternative, "or with intent," etc., adds to the uncertainty. It seems to be impossible to sustain the commitment against such an objection.

But it was urged on behalf of the Crown that under the provisions of sec. 800 of the Criminal Code the commitment was not to be held void by reason of any defect therein, as it was alleged that the offender had been convicted, and there was a good and valid conviction to sustain the commitment. If the conviction in this case is valid, possibly the section of the Code referred to does prevent the objection taken being successful, because the commitment does allege a conviction. However, on turning to the conviction, I find that not only is it not for the offence recited in the commitment, which probably would not be a fatal objection, having regard to the words of the section, but also it does not disclose any offence within the section of the statute under which this prosecution was had, which is sec. 185 of the Code. The conviction is that "the prisoner, at Hamilton aforesaid, in the county aforesaid, did unlawfully procure a girl of seventeen years, Ida Dawson, to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the said Maud Gibson at Lockport in the State of New York, one of the United States of America." The section to which I have referred

Judgment. makes every one guilty of an indictable offence who, amongst
Rose, J. other things, procures or attempts to procure any woman or girl to leave Canada, with intent that she may become an inmate of a brothel elsewhere, or to come to Canada from abroad, with intent that she may become an inmate of a brothel in Canada, or to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada. These are the only provisions of such section that could in any manner be invoked to support the conviction; and it is manifest that no one of them does support it.

Another question has been raised which is not without weight, namely, that there is no evidence to shew that the prisoner did unlawfully *procure* a girl to become an inmate of a brothel, because, admitting an intention to do so, it rested merely in an attempt, as the parties were all arrested in Canada before crossing the river. But I need not express any opinion upon this objection.

I think, therefore, that the commitment must be held void as reciting a conviction which on the face of it is invalid; and that I cannot support the commitment under the provisions of sec. 800, because, upon looking at the conviction, which has been returned to the Court, I find that it is not a good and valid conviction.

I have not considered the objection taken by the Crown that the writ of *habeas corpus* should not have been granted where the conviction is one under the provisions of the statute for summary trial of indictable offences. This objection has been dealt with in a considered judgment by the learned Chief Justice who made the order for the writ, and I think it best to follow his judgment without expressing any opinion of my own, leaving the Crown, if it be so advised, to raise the question in any manner that may be open to obtain the opinion of an appellate tribunal.

The order must go for the discharge of the prisoner.

E. B. R.

RE YOUNG.

Infants—Custody—Paternal Right—Maternal Right—Separation of Family.

The provision of R. S. O. ch. 168, sec. 1, with regard to the custody of infants, recognizes the maternal as well as the paternal right, and requires equal regard to be paid to the wishes of the mother as to those of the father; and thus, where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare of the children.

And where the father was guilty of adultery with a servant in his house, and of making unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and at times cruel to her and them :—

Held, upon *habeas corpus* proceedings taken by the father and a petition for custody by the mother, that it was for the welfare at least of the children under five years that they should remain in their mother's custody, and, as it would be wrong to divide the custody, all the children, the eldest being fifteen, should remain in the custody of the mother.

The difference between the law of England and that of this Province specially referred to.

AN application by Andrew Young, upon the return of a *Statement. habeas corpus*, for an order upon his wife and her father for the delivery to him of his infant children; and a petition by his wife, Maggie Young, the mother of the children, praying that she might be awarded the custody of them. The facts are stated in the judgment.

The application and petition were heard by ARMOUR, C. J., in Chambers, on the 9th September, 1898.

L. F. Heyd, for the applicant.

J. H. Moss, for the mother.

October 11, 1898. ARMOUR, C. J. :—

Andrew Young was married to Maggie Taylor in the year 1882, and they lived together in the county of Oxford, in the Province of Ontario, until the 24th day of March, 1896, when the said Andrew Young removed to the Province of Manitoba, and in the month of June following, his wife, with their children, followed him, and they continued to live there until the month of November,

Judgment. 1897, when his wife left him and returned to her father's Armour, C.J. house in the county of Oxford, bringing their children with her.

There had been born to them at that time seven children, namely, Mary S. Young, aged at that time fourteen years; Bessie Young, twelve years; Louisa Young, eleven years; George Young, nine years; Beatrice Jane Young, eight years; Sarah Young, four years; and Hardie Young, two years.

On the 5th day of January, 1898, the said Andrew Young obtained a writ of *habeas corpus* to be issued out of this Court, addressed to the said Maggie Young, his wife, and to William Taylor, her father, commanding them to bring up the bodies of the said children; and while proceedings under the said writ were pending, and on the 9th day of June, 1898, the said Maggie Young presented her petition to this Court praying that she might be awarded the custody of the said children.

And on the 9th day of September, 1898, the matter of the writ of *habeas corpus* and of the petition came on to be heard before me at Chambers upon affidavits filed on each side and upon the cross-examination of the deponents to such affidavits.

I think that I must give credence to the evidence of the wife in preference to that of her husband, for her evidence is apparently truthful, and is to some extent corroborated, while that of her husband is undoubtedly false so far as it relates to his connection with Louisa Krueger, and being untrustworthy in this regard, cannot be relied on in other respects.

That he was guilty of adultery in seducing Louisa Krueger, while she was a servant in his house, is beyond doubt upon the evidence, and taking his wife's evidence, as I do, to be true, he was guilty of making base and unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and unkind and at times cruel to her and them.

This conduct on his part may or may not be sufficient according to the English law to forfeit his paternal right to the custody of the children, but the law of this Province as to the custody of infants is essentially different from the law of England. Judgment.
Armour, C.J.

The provision of the English Act 36 Vict. ch. 12 is that "from and after the passing of this Act it shall be lawful for the High Court of Chancery in England or in Ireland, respectively, upon hearing the petition, by her next friend, of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age not exceeding sixteen as the Court shall direct, and further to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise as the said Court shall deem proper."

The provision of our Act R. S. O. ch. 168, sec. 1, is that "the High Court or Surrogate Court, or any Judge of either Court, may, upon the application of the mother of an infant (who may so apply without next friend) make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as the Court or Judge may think just."

This provision was first enacted by the Act 50 Vict.

Judgment. ch. 21, and was in substitution of the former provision on the same subject to be found in R. S. O. 1877 ch. 130, **Armour, C.J.** which was similar in effect to the provision of the English Act above quoted.

The decisions under the English Act all uphold the wishes of the father as to his children as paramount, unless by his misconduct he has forfeited his paternal right to have his wishes enforced: and to shew how strenuously his wishes have been upheld as paramount and enforced, it is only necessary to refer to *Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317.

But this provision of our Act recognizes the maternal right as well as the paternal right, and requires equal regard to be paid to the wishes of the mother as to those of the father.

The result of this is that where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare of the children.

In this case, the wishes of the mother being opposed to the wishes of the father, I must determine what is most for the welfare of the children.

Since these proceedings were commenced another child has been born, and it is impossible to say that it would be for the welfare of this child that it should be removed from the custody of its mother and delivered into the custody of its father.

Nor do I think that it could be well held to be for the welfare of the children aged respectively four years and two, that they should be removed from the custody of their mother and delivered into the custody of their father.

Having come to this conclusion, it is impossible to change the custody of any of the children, for the authorities shew it to be wrong to divide the custody, thus separating the children: *Warde v. Warde* (1849), 2 Ph. 786; *Re Elderton* (1883), 25 Ch. D. 220; *Smart v. Smart*, [1892] A. C. 425.

It is to be hoped that, as the father has become a "church

member," he will strive to become a Christian also, and Judgment. to regain the affection of his wife, which he has lost Armour, C.J. through his misconduct.

I therefore order that the mother shall retain the custody of the children, and that the father shall have access to them at such times as may be agreed upon, and in case of failure to agree, on being referred to, I will settle the times.

The petition does not ask for an order for the maintenance of the children by the father, but such an order may be applied for hereafter upon proper material for that purpose.

The father must pay to the mother and to her father their costs of this litigation.

E. B. B.

RE HENDERSON AND CITY OF TORONTO.

Municipal Corporations—By-law—Registration—Plans—"Instrument"—Notice.

A municipal by-law, passed in 1888, providing for the opening of a road was received at the proper registry office and the fee for registry was paid, but the by-law was never entered or registered, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 ch. 114, sec. 84, sub-sec. 2 :—

Held, that the by-law was an "instrument" within the meaning of that section, and as defined by sec. 2, but was not an "instrument capable of registration" within the meaning of sec. 96 of R. S. O. 1897 ch. 136, and the registrar was right in refusing to register it; and, never having been registered, it never became "effectual in law" for any purpose; and a subsequent by-law providing for the cost of opening the road was, therefore, invalid.

The requirement of the Municipal and Registry Acts (R. S. O. 1897 ch. 223, sec. 633, and ch. 136, sec. 86) that such a by-law shall be registered before it "becomes effectual in law," is not merely for the purpose of notice under the registry laws.

THIS was a motion by James Henderson to quash a Statement by-law of the corporation of the city of Toronto.

The motion was based upon several grounds, but the judgment proceeds upon one only, the facts and contentions as to which are fully set out therein.

Statement. The motion was heard by ARMOUR, C. J., in Court, on the 26th April, 1898.

F. E. Hodgins, for the applicant.

Fullerton, Q.C., and *Caswell*, for the city corporation.

October 13, 1898. ARMOUR, C. J. :—

This was an application to quash by-law numbered 3519 of the defendant corporation "to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Rosedale Valley road, between Yonge street and the river Don, in ward No. 2, for the cost of opening the said street."

The by-law of the defendant corporation numbered 2164 was the by-law which provided for the opening of the Rosedale Valley road, and one of the grounds upon which it was sought to quash by-law numbered 3519 was that by-law numbered 2164 was never registered, and the road was, therefore, never validly opened, and no assessment could be made for its cost.

By-law numbered 2164 was passed on the 27th day of July, 1888, and the law then as now was that "every by-law passed since the 29th day of March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road or highway has been, or is, opened upon any private property, shall, before the same becomes effectual in law, be duly registered in the registry office of the registry division in which the land is situate; and for the purpose of registration a duplicate original of the by-law shall be made out, certified under the hand of the clerk and the seal of the municipality, and shall be registered without any further proof:" R. S. O. 1887 ch. 184, sec. 547; R. S. O. 1887 ch. 114, sec. 75; R. S. O. 1897 ch. 223, sec. 633; R. S. O. 1897 ch. 136, sec. 86.

A duplicate original of this by-law numbered 2164, certified under the hand of the clerk and the seal of the defendant corporation, was received at the proper registry

office on the 22nd day of August, 1888, and the fees, \$2, for ^{Judgment.} the registry thereof were there and then paid, but it was ^{Armour, C. J.} never registered or entered in any of the books of the registry office, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 ch. 114, sec. 84, sub-sec. 2.*

The registrar was, in my opinion, right in holding that this by-law came within the prohibition of that section, for the reason assigned, and because this by-law was an "instrument" within the meaning of that section and as defined by sec. 2 of the said Act.

Reference was made upon the argument to R. S. O. 1897 ch. 136, sec. 96,† but that section must be read with sec. 100‡ of the same Act, and so reading it, the effect of sec. 100 is not diminished, for this by-law was not, under the circumstances, "capable of registration."

Having come to the conclusion that this by-law never was registered, the statute compels me to hold that it never became "effectual in law" for any purpose.

I was at first under the impression that registration of such a by-law was only required for the purpose of notice under the registry laws, and that the words "before the same becomes effectual in law," might be read as limited in this way, "before the same becomes effectual in law as notice within the registry laws," and the case of *Beveridge*

* Sec. 84 (2). Every such map or plan, before being registered, shall be * * signed and shall also be certified * * ; and thenceforth the Registrar shall keep an index of the lands described * * ; and all instruments affecting the land or any part thereof, executed after the plan is filed with the Registrar, shall conform and refer thereto, otherwise they shall not be registered.

† 96. Every instrument capable of registration and having the proper affidavit of execution attached thereto, shall be deemed to be registered when and so soon as the same is delivered to and received * * by the Registrar * * and a tender or payment made of the proper fees therefor * * .

‡ Section 100 (3) of R. S. O. 1897 ch. 136 contains the same provision as R. S. O. 1887 ch. 114, sec. 84 (2).

Judgment. v. *Creelman* (1877), 42 U. C. R. 29, gives some countenance to this impression.

But this provision for the registration of such a by-law did not at first appear in any registry Act but in a municipal Act, 29 & 30 Vict. ch. 51, sec. 348, and I do not think that I am at liberty to add to the plain words of this enactment anything qualifying their effect.

I must, therefore, hold that this by-law, never having been registered, never became effectual in law, that is, that it never had any force or effect, or any validity whatever, and that nothing done under it can be justified by it.

It is true that it was held by the Chancery Divisional Court that such a by-law might be moved against and set aside before registration,* but this is a very different thing from holding that proceedings under it, although not registered, might be justified under it.

The result of my judgment, therefore, is that by-law numbered 3519 must be quashed with costs.

E. B. B.

* *Harding v. Township of Cardiff* (1882), 2 O. R. 329.

[DIVISIONAL COURT.]

LAZIER V. HENDERSON.

Landlord and Tenant—Assignment for Benefit of Creditors—Future Rent—Preferential Lien—Distress—R. S. O. ch. 170, sec. 34.

By the terms of a lease of shop premises, the rent was payable quarterly in advance. There was also a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors:—

Held, that the expression "arrears of rent due * * for three months following the execution of such assignment" in sec. 34 of the Landlord and Tenant's Act, R. S. O. ch. 170, means "arrears of rent becoming due during the three months following the execution of such assignment;" and the landlord was, therefore, apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment:—

Held, also, that the expression "the preferential lien of the landlord for rent" in sec. 34 has the same meaning that it had under the Insolvent Acts; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress.

AN appeal by the defendant from a judgment of the junior Judge of the County Court of Hastings upon the following facts. Statement.

On the 23rd July, 1894, the plaintiff leased to one Gough, certain premises in Belleville for ten years from the 1st September, 1894, at the annual rent of \$900, payable quarterly in advance by quarterly payments of \$225, on the 1st September, December, March, and June, in each year, the first payment to be made on the 1st September, 1894. The quarterly payments were subsequently reduced by arrangement to \$210. The lessee occupied the premises as a shop until the 13th September, 1897, when he made an assignment for the benefit of his creditors to the defendant. There was at the time of the assignment a large stock of goods upon the premises worth some thousands of dollars. At the time of the assignment there was rent in arrear under the lease as follows:—

Statement.	\$ 10.75	being balance overdue on 1st January, 1897, of rent due 1st December, 1896.
	210.00	" 1st March, 1897.
	210.00	" 1st June, 1897.
	210.00	" 1st September, 1897.

\$ 640.75 total then overdue.

The plaintiff on 5th September, 1897, had issued a distress warrant, and the expense of doing so, including bailiff's fees, was agreed on at

5.00

\$ 645.75 total overdue to 1st September, 1897, inclusive.

The plaintiff sent the assignee his claim on the 20th September, 1897, claiming in addition to the above amount a further sum of \$210 for rent due the 1st December, 1897, under an acceleration clause in the lease, which was as follows: " Provided also that if the term hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of creditors, or, being bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current quarter's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void, but the next succeeding current quarter's rent shall also nevertheless be at once due and payable."

The plaintiff claimed to be a preferred creditor for the whole amount so claimed, viz :

\$ 645.75	overdue on 1st September, 1897, and
210.00	due under the acceleration clause
—	besides some interest which he afterwards
\$ 855.75	abandoned ; and he agreed to give credit
10.00	for a contra account amounting to
—	reducing his claim to
<u>\$ 845.75</u>	

The defendant disputed the correctness of this claim ; **Statement.** he gave notice to the plaintiff under sub-sec. (2) of sec. 34 of ch. 170, R. S. O., that he elected to retain possession of the premises for three months from 13th September, 1897, and sent him a draft for \$666.05 made up as follows, insisting that the plaintiff could recover nothing further :

Balance of rent 1st January, 1897,	\$ 10.75
Rent due 1st March, 1897,	210.00
Rent due 1st June, 1897,	210.00
Rent from 1st September to 13th September, 1897, date of assignment for benefit of creditors	30.30 (*)
Three months' rent from 13th September, 1897, under the statute	210.00 (*)
Bailiff's charges	5.00
	<hr/>
	\$ 676.05
Less contra account	10.00
	<hr/>
Draft enclosed for	\$ 666.05

This payment the plaintiff credited on account, and brought the present action to recover the rent due 1st September, 1897, \$210, and the accelerated rent due 1st December, 1897, \$210, less the \$30.30 and the \$210 marked (*) in the above statement. The defendant by his statement of defence denied the plaintiff's right to recover any sum beyond the \$666.05 so paid, and denied the plaintiff's right to a preference over the other creditors, even if such sum were payable.

The action was tried before the junior Judge of the County Court of Hastings on the 20th December, 1897, without a jury. On the 20th March, 1898, he gave judgment for the plaintiff for \$179.30 and costs of the action, but saying nothing as to the right to rank as a preferred creditor.

From this judgment the defendant appealed to a Divisional Court, upon the grounds that in any event there was no preferential lien in force when the action was

Statement. brought; that the plaintiff had never distrained upon the property, and had lost any preferential right that he might have possessed; that the defendant had paid to the plaintiff all that he could in any event claim; and that the acceleration clause in the lease was a fraud upon creditors.

The appeal was argued on the 6th June, 1898, before FALCONBRIDGE and STREET, JJ., sitting as a Divisional Court.

V. J. Hughes, for the defendant, appellant, cited *Re McCracken* (1879), 4 A. R. 486, 496; *Clarke v. Reid* (1896), 27 O. R. 618; *Re Hoskins and Hawkey* (1877), 1 A. R. 379, 383; *Griffith v. Brown* (1870), 21 C. P. 12; *Langley v. Meir* (1898), 34 C. L. J. 467.

E. G. Porter, for the plaintiff, respondent, referred to *Baker v. Atkinson* (1886), 11 O. R. 735; *S. C.* (1887), 14 A. R. 409; *Linton v. Imperial Hotel Co.* (1889), 16 A. R. 337; *Graham v. Lang* (1885), 10 O. R. 248, 253.

October 8, 1898. STREET, J.:—

In my opinion, upon any construction which can be placed upon sec. 34 of ch. 170, R. S. O., the plaintiff is entitled to recover the full amount allowed him by the Court appealed from. There is no dispute at all about the following items of the plaintiff's claim:—

Arrears 1st January, 1897, which became	
due 1st December, 1896,	\$ 10.75
Quarter's rent due 1st March, 1897,	210.00
“ “ 1st June, 1897,	210.00
	<hr/>
	\$ 430.75

I cannot conceive any possible ground upon which the quarter's rent due 1st September, 1897, can be, although it is, disputed, and so I add it

	210.00
	<hr/>
Undoubtedly due the plaintiff	\$640.75

The 34th sec. of ch. 170, R. S. O., provides that "In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased." There can be no "arrears of rent" until rent has become due. Therefore the expression "arrears of rent due * * for three months following the execution of such assignment" must mean "arrears of rent becoming due during the three months following the execution of such assignment," and this construction has the merit of avoiding any hiatus between the date when the last rent becomes due under the terms of the lease before the date of the assignment, and the commencement of the "three months following the date of the assignment." It is open to the possible objection that in case of rent payable half-yearly or yearly not happening to fall due within three months after the assignment the landlord loses the benefit of the three months' clause; but the clause is so loosely drawn that no possible construction of it is free from objection.

Judgment.
Street, J.

Taking the construction I have placed upon it to be the correct one, the plaintiff is entitled to add to the undoubted \$ 640.75 above mentioned the further sum of 210.00 falling due on 1st Dec. 1897,

making a total of \$ 850.75. Add to this the bailiff's fees 5.00 which the defendant has allowed

to the plaintiff \$ 855.75 and deduct the contra account \$ 10.00 and the cash paid 666.05 676.05 and the balance due

the plaintiff is \$ 179.70, being 40 cents more than the learned junior Judge has allowed him. So that, without regarding the question as to whether the plaintiff might or might not have been entitled to claim a further quarter's rent from the assignee under the terms of the 2nd sub-

Judgment.
Street, J.

section of sec. 34 of ch. 170, R. S. O., because of his having given to the plaintiff notice of his intention to hold possession of the premises until the 13th December, 1897, when he would have entered upon a new quarter, the plaintiff is entitled to all that the learned Judge has given him.

I am further of opinion that the plaintiff is entitled to be paid this balance of \$179.70 out of the proceeds of the goods of the insolvent upon the premises covered by the lease, in priority to the general creditors of the estate. As there seems to be no doubt that there were upon the premises at the time of the assignment amply sufficient goods to cover the plaintiff's claim, this is equivalent to saying that the plaintiff is to be paid in full.

The conclusion at which I have arrived with regard to this question seems to me inevitable when sec. 34 is carefully considered. In the first place the expression "the preferential lien of the landlord for rent" is borrowed from the Insolvent Acts of 1869 and 1875, and received a judicial construction in *Re McCracken* (1879), 4 A. R. 486. It was there held that, although by our law a landlord has no lien upon his tenant's goods until distrained, yet because the right to distrain was taken away by these Acts, while at the same time a so-called preferential lien for his rent was preserved to the landlord, he was entitled, without making any distress, to require the assignee to pay him, out of the proceeds of the goods upon which he might but for the Act have distrained, the amount for which the statute assumed him to have a lien. The circumstances under which the same expression is used in sec. 34 of ch. 170, R. S. O., are so widely different that without a compelling context it would be impossible to deduce the same result, notwithstanding the absolute identity of the expression made use of. There is nothing in the provisions of the Acts relating to assignments for the benefit of creditors which at all interferes with the landlord's right to distrain for his rent except only as regards the *quantum*, which must be taken to be limited by sec. 34 of ch. 170, R. S. O.; and so the reason which led

to the construction placed upon the expression in *Re McCracken*, is absent. But it is evident that it has been used by the Legislature in the same sense as that given to it when used under the Insolvent Acts. If we were to hold that a landlord had no lien until he distrained, we could not hold that he had a lien at all, in most cases, for the three months' rent becoming due after the assignment. The assignee could defeat any lien for that part of the landlord's claim by removing the goods before it became due. This cannot reasonably be supposed to have been intended by the Act, and so we are driven to place upon the expression in question the very same construction as that placed upon it under the Insolvent Acts, and to treat the landlord as having a statutory lien, independent of either distress or possession, for the rent as limited by the 34th section, upon the goods subject to distress at the time of the assignment.

Judgment.
Street, J.

For these reasons I think that the appeal should be dismissed with costs, and that the plaintiff should be declared entitled to be paid the balance found due him as a preferred creditor out of the proceeds of the goods upon the premises in question at the date of the assignment.

Since the above was written I have seen the judgment of the Court of Appeal in *Langley v. Meir*, delivered just before the long vacation. The construction placed by the majority of the Court in that case upon the 34th section of ch. 170, R. S. O., differs from the construction which I have placed upon it, but the result in the present case is not in any way affected. They held that the only object and effect of the section in question was to avoid, as against an assignee for creditors, any clause purporting to accelerate future payments of rent beyond the period of three months from the date of the assignment. Assuming this to be the true construction of the clause, the acceleration in the present case falls well within the period so limited.

FALCONBRIDGE, J. :—

I agree in the result.

E. B. B.

MERCER V. NEFF ET AL.

Executors and Administrators—Will—Devise—Power to Mortgage—Payment of Debts—Trustee Act—Devolution of Estates Act.

The testatrix, after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children :—

Held, that this was a devise of the farm out and out as to the legal estate—the words “and his executors and administrators” being equivalent to “heirs and assigns ;” the executor had the right by virtue of sec. 16 of the Trustee Act, R. S. O. ch. 129, to mortgage the entire fee for debts ; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by sec. 19.

In re Bailey (1879), 12 Ch. D. 268, and *In re Tanqueray-Willauwe and Landau* (1882), 20 Ch. D. at p. 476, followed.

The Devolution of Estates Act, R. S. O. ch. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act.

Statement. SPECIAL case stated in an action by a mortgagee of a farm, for foreclosure. The facts stated in the case were as follows :—

On the 1st November, 1882, Emily Frances Wardlaw, being the owner of the lands in question, mortgaged them to one Jesse Forster. The mortgage was subsequently assigned to the plaintiff.

Emily Frances Wardlaw died on the 13th June, 1891, in possession of the mortgaged lands, leaving a will by which she appointed her husband, the defendant Henry J. T. Wardlaw, sole executor and trustee, directed that all her just debts and funeral and testamentary expenses should be paid by her executor as soon as conveniently might be after her decease, and devised the land in question to him, and his executors and administrators, “upon trust to retain for his own use and benefit absolutely the use and enjoyment thereof and income therefrom during the term of his natural life. And after the decease of my said husband I will and direct that his executors or administrators shall sell the said farm for such price as may be reasonably obtained therefor, and that the proceeds of such sale shall

be equally divided between my children, share and share alike, such share to be paid to each of them as they severally attain the full age of twenty-one years, the interest meanwhile being expended for their benefit. * * I also empower my said executor and trustee to sell the whole or any part of my said farm at any time and in any way he may deem best, and in case of such sale or sales I direct him to invest and reinvest the proceeds thereof from time to time on good security, and to retain for his own use and benefit absolutely the interest of such investments during the term of his natural life." Statement.

Probate of the will was granted to the defendant Henry J. T. Wardlaw.

On the 12th December, 1892, the defendant Henry J. T. Wardlaw borrowed from the plaintiff, who was then the holder of the mortgage made by the testatrix, the sum of \$1,600, and made in the plaintiff's favour a mortgage for \$2,600, upon which the plaintiff's claim in this action was based.

Of the \$1,600, \$198 was applied in payment of interest overdue on the original mortgage, and the residue was used by the defendant Henry J. T. Wardlaw for his own purposes.

At the time this mortgage was made the children of the testatrix were, to the knowledge of the plaintiff, infants.

With the exception of the amount due on the original mortgage, there were at the time of the making of the new mortgage no unpaid debts of the testatrix.

The mortgage deed was on its face stated to be made by the defendant Henry J. T. Wardlaw as the sole executor and trustee under the will, and it contained a recital that the money advanced was "to be applied for the purposes of the estate" of the testatrix.

Nothing was said at the time the money was borrowed as to the use to which it was to be put by the mortgagor, nor was any representation in regard thereto made by him other than that contained in the instrument itself, as to which he said, upon oath, in this action, that he did not

Statement. know it was in the instrument when he executed it. This, however, the plaintiff did not admit.

The defendants in the action were Henry J. T. Wardlaw and the children, adult and infant, of the testatrix.

The case was heard by BOYD, C., in Court, on the 19th October, 1898.

J. R. Roaf, for the plaintiff. The mortgage is valid against the interest of all the defendants in the mortgaged lands for the whole amount due thereon: sec. 16 of the Trustee Act, R. S. O. ch. 129; *London and Canadian L. & A. Co. v. Wallace* (1884), 8 O. R. 539; *West of England, etc., Bank v. Murch* (1883), 23 Ch. D. 138; *In re Venn and Furze's Contract*, [1894] 2 Ch. 101, 114; *Ewart v. Gordon* (1867), 13 Gr. 40; Fisher on Mortgages, 5th ed., sec. 374; Lewin on Trusts, 8th ed., pp. 425, 426.

W. H. Irving, for the defendant Grace Ellen Richardson. The mortgage is valid only to the extent of the principal and interest due on the first mortgage, with subsequent interest. The Devolution of Estates Act applies, and the consent of the official guardian was not obtained (sec. 8), nor was any caution registered (sec. 13). The case is not within sec. 16 of the Trustee Act. Since the Devolution of Estates Act the charge of debts required by that section must be found in the will, and the Court will no longer imply an intention on a testator's part to make his lands assets for the payment of debts, and thereby give sec. 16 application and oust the provisions of the Devolution of Estates Act, when that Act in express terms makes lands assets for the payment of debts. The foundation of all the cases where the intention has been supplied by implication will be found to rest on the desire of the Courts to hold testators honest: see *Price v. North* (1841), 1 Ph. 85; *Keeling v. Brown* (1800), 5 Ves. 359. The Devolution of Estates Act has taken away all need for this, and the cases do not apply. In any event where an executor has been directed to pay debts, and lands are devised to him, the charge has never been extended beyond the

lands devised, and here a life estate only is devised : Argument.

Cook v. Dawson (1861), 29 Beav. 123; *Powell v. Robins* (1801), 7 Ves. 209; *Gosling v. Carter* (1845), 1 Coll. 644. The rule applies where, (1) lands are devised beneficially, (2) where lands are devised in trust; the presumption in either case being that the lands are put in the hands of the executor to meet the obligation which the will puts upon him to pay debts: see *Harris v. Watkins* (1854), Kay 438; *Henvell v. Whitaker* (1827), 3 Russ. 343. But where, as here, by the same will an interest in lands has been devised to an executor beneficially, and a different interest devised to him in trust, the rule has never been applied to charge the latter: *Warren v. Davies* (1833), 2 My. & K. 49. Whether there is a charge or not is always a question of intention, having regard to the will as a whole: see *Robbins on Mortgages*, p. 406; *Farwell on Powers*, 2nd ed., p. 72; *In re Bailey* (1879), 12 Ch. D. 268. There is no devise here of the whole estate of the testatrix to the executor as trustee. The words "executors and administrators" are not intended as words of limitation. The will shews that they are *personæ designatæ* by the testatrix to carry out the trusts of the will after the death of the life tenant. The life tenant has no trust to execute. The only trust is the trust to sell imposed on his executors and administrators after his death. "Administrators" of an executor never take lands by succession: see *Williams on Executors*, 9th ed., p. 205; *Re De Burgh Lawson* (1889), 41 Ch. D. 568; *Fisher on Mortgages* 5th ed., pp. 173-78; *Symons v. James* (1843), 2 Y. & C. Eq. 301; *Wasse v. Heslington* (1843), 3 My. & K. 495.

C. H. Porter, for the defendants Neff and Wardlaw.

A. J. Boyd, for the infant defendants.

October 20, 1898. BOYD, C. :—

The principles of law sufficient for the disposal of this case are stated by Fry, J., in *Re Bailey* (1879), 12 Ch. D. at p. 273; he says, "Where there is a direction that the executors

Judgment. shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest * * or only a life interest * * or no beneficial interest at all * * But in all cases the entirety of the liability has been thrown on the entirety of the estate." This passage has been accepted as law by Jessel, M.R., in *Re Tunqueray-Willaume and Landau* (1882), 20 Ch. D. at p. 476.

Boyd, C.

The will as to the land disposes of it thus : " I give and devise my farm * * to my said executor and trustee (who is previously named), and his executors and administrators, upon trust to retain for his own use for life, and after his decease his executors and administrators shall sell the farm and divide proceeds among my children."

That is, in effect, a devise of the farm out and out as to the legal estate to the husband as trustee and executor—the added words, " and his executors and administrators," are intended equivalents for the " usual heirs and assigns," and only go to shew that the entirety of the estate is given to the executor, though beneficially only for his life: see *per* Mr. Justice Wilmot in *Rose v. Hill* (1766), 3 Burr. at p. 1885: " 'Executors' is equivalent to 'heirs' in a will." The right to mortgage for debts then falls under the provisions of the statute R. S. O. ch. 129, sec. 16, and being made within eighteen months of the death, it was competent for the executor so to deal with the land, and the mortgagee is exonerated from all inquiry by the 19th section of the statute.

The Devolution of Estates Act, R. S. O. ch. 127, does not apply to this case, where the executor acts under the will and the provisions of the Trustee Act. The executor does not invoke the provisions of the Devolution of Estates Act to enable him to sell and make title; for these he derives from the provisions of the will as made effective by the Trustee Act. The title would not pass under the 13th section of R. S. O. ch. 127, sub-sec. (1), at the end of the year,

for it was held by the executor by the will as trustee in fee for himself and the children of the testatrix : see R. S. O. ch. 127, sec. 16 (2), at end ; *Re Booth* (1888), 16 O. R. 429 ; *Re Koch* (1894), 25 O. R. 262 ; and *Re Hewett* (1898), 29 O. R. 383. [The death of the testatrix was on the 13th June, 1891, and the mortgage impeached was made on the 12th December, 1892. See also R. S. O. ch. 127, sec. 13 (7).]

Judgment.
Boyd, C.

Nothing was said about costs. I affirm the validity of the mortgage as to the land, against the infants.

E. B. B.

[DIVISIONAL COURT.]

RE LEAK AND THE CITY OF TORONTO.

*Municipal Corporations—Arbitration and Award—Lands Injuri-
ously Affected—Compensation—Interest.*

Where compensation is allowed in an award for lands "injuriously affected" by the exercise of the powers of a municipal corporation under section 483 of 55 Vict. ch. 42 (O.) (R. S. O. ch. 223, sec. 437), the arbitrator, although no land is taken, may award interest on the amount from the date of the by-law authorizing the work. FERGUSON, J., dissenting.

Decision of STREET, J., reversed.

THIS was an appeal from an order of STREET, J., referring back an award for amendment, and also from an order of BOYD, C., disposing of the costs of the matter and dismissing an appeal by the claimant William Leak against the award as amended by the arbitrator.

Statement.

F. M. Morson, Esquire, junior Judge of the county of York, had been appointed arbitrator "in the matter of a claim for compensation for damages made by one William Leak against the corporation of the city of Toronto for lands taken and damages and injuries to his property arising out of the erection, construction and reconstruction of new bridges, approaches and grades thereto," and an

Statement. award had been made awarding him \$8,782.41 with interest from 16th March, 1891, the date of the by-law under which the work was authorized.

The corporation appealed against the award in so far as the allowance of interest was concerned, alleging that no land was taken and that it did not appear upon the face of the award that any was taken, and that interest could not be allowed where land was only injuriously affected.

The appeal was argued in Court on the 11th March, 1897, before STREET, J.

J. B. Clarke, Q.C., and W. C. Chisholm, for the appeal.
F. E. Hodgins, contra.

April 20th, 1897. STREET, J. :—

The learned arbitrator has awarded \$8,782.41 with interest from 16th March, 1891, to the land owner William Leak for the "entering on, taking and injuriously affecting" certain lands mentioned in the award.

Upon the face of the award he does not distinguish between the sums, if any, awarded for "injuriously affecting" and those awarded for lands taken. In a certificate signed by him after the making of the award, he says that the sum awarded was only in respect of lands injuriously affected and not for lands taken. Upon a subsequent examination upon oath, held for the purpose of this motion, the arbitrator declined to state whether the sum awarded was for lands taken or for lands injuriously affected.

If the compensation or part of it has been awarded as purchase money for lands taken, then the award should state what land has been taken, and what sum has been awarded in respect of it, so that it may be made plain what rights, if any, the city acquires under the award. If no land has been taken, and the amount awarded is exclusively for injury done by the raising or lowering of the street to the adjacent lands, then this should be made clear upon the face of the award.

If the amount awarded is exclusively composed of damages inflicted upon adjoining land by the raising or lowering of the street, I am of opinion that the allowance of interest should not have been made upon the broad ground that in the absence of express authority unliquidated damages of this nature do not bear interest. If, however, any part of the amount is awarded for lands actually taken then *Re Macpherson and The City of Toronto* (1895), 26 O. R. 558, shews my views as to the allowance of interest upon what is in effect purchase money.

Judgment.
Street, J.

I think, therefore, that under the circumstances, I must refer the award back to the arbitrator in order that the matters to which I have called attention may be made plain, and that he may, if necessary, alter or modify the award so far as the question of interest is concerned.

The costs of the present motion will be reserved until after the further award shall be made. I think that in disposing of them, it should be considered that the real question in dispute upon the present application is, whether Mr. Leak is or is not entitled to the interest which has been awarded to him, and the costs of this motion as well as of the reference back should be given to the party substantially succeeding upon that issue.

Subsequently on the reference back the arbitrator awarded the said William Leak the sum of \$8,782.41 without interest and found specially :—

1. That no land was taken from the claimant by the corporation of the city of Toronto.
2. That no part of the sum so awarded by him had been awarded for land taken, but that the same was so awarded for lands injuriously affected adjacent to Dundas street.
3. And amended the award by striking out of it that portion awarding interest.

The corporation of the city of Toronto then moved for a disposition of the costs reserved by STREET, J., and the

Statement. claimant Leak also appealed against the amended award ; and the motion and appeal were heard together in Court on the 11th January, 1898, before BOYD, C.

J. B. Clarke, Q.C., for the city of Toronto.

W. H. Blake, contra.

The learned Chancellor considered himself bound by the judgment of STREET, J., and allowed the city the costs of the previous proceedings and formally dismissed the claimant's appeal with costs.

From this judgment and the order of STREET, J., the claimant Leak appealed to a Divisional Court and the appeal was argued on May 5th, 1898, before FERGUSON, ROBERTSON, and MEREDITH, JJ.

W. H. P. Clement, for the appeal. It is alleged no land was taken, but the contrary is the fact. Land was taken in that the right of ingress and egress of the property, which is part of the land, was taken. The right of immediate access from private property to a highway is a private right distinct from the right of the owner to use the highway : *Lyons v. The Wardens, etc., of the Fishmongers' Co.* (1876), 1 App. Cas. 662, at p. 684. This is the same as a railway compensation case which is to be treated as a vendor and purchaser case, the owner being an unwilling vendor. Compensation and purchase money are the same in cases like this. This is a proper case for interest to be allowed. I refer to the Municipal Act, 55 Vict. ch. 42, sec. 2, sub-sec. 7, and secs. 483, 484, 485, 486, and 488 ; *Rhys v. Dare Valley R. W. Co.* (1874), L. R. 19 Eq. 93 ; *In re Piggott and Great Western R. W. Co.* (1881), 18 Ch. D. 146 ; *In re Shaw and The Corporation of Birmingham* (1884), 27 Ch. D. 614 ; *Re Macpherson and The City of Toronto* (1895), 26 O. R. 558 ; Pratt's Law of Highways, 14th ed. 98.

Fullerton, Q.C., and *W. C. Chisholm, contra.* There was no right of ingress or egress taken, it may be a little more

difficult but it is still there. [MEREDITH, J.—His rights of access are gone; you may give or leave some means of access, but they are not the same.] The arbitrator has found no land was taken, so no interest can be allowed for merely injuriously affecting lands; but even if it could Leak is not entitled to it on the merits as the delay was caused by him. In any event the date of the award is the time it should be calculated from: *In re Prittie and Toronto* (1892), 19 A. R., at p. 529. I refer also to *McCullough v. Clemow* (1895), 26 O. R., at p. 472, *per* Osler, J.A.; *London, Chatham and Dover R. W. Co. v. South-Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429; *McCullough v. Newlove* (1896), 27 O. R. 627; Russell's Law of Arbitrations, 7th ed. 420; Cripps on Compensation, 3rd ed. 419, 423; 55 Vict. ch. 42, sec. 404 (O.).

Clement, in reply.

September 8, 1898. ROBERTSON, J.:—

The sum awarded was compensation to the claimant for "injuriously affecting" lands belonging to him on Dundas street west, in the city of Toronto, and the only question is, whether the arbitrator should have allowed interest on the sum awarded.

There is no dispute as to the amount of the compensation awarded, nor is there any dispute as to the liability of the city to compensate for the injury complained of, but it is contended that as the compensation is in the nature of damages, that interest is not chargeable until and only from the time the amount is ascertained.

The arbitrator by the award first made by him, allowed interest from the time the claimant was entitled to have the amount assessed, which I understood was on the 16th March, 1891, the date on which the corporation of the city passed the by-law authorizing the work, the carrying out of which injuriously affected the plaintiff's lands.

That award was remitted back on appeal by my brother Street, to award and state, whether any, and,

Judgment. if so, what land has been taken, and also to award and
Robertson, J. state, whether any, and, if so, what part of the sum awarded (\$8,782.41) had been awarded in respect of land (if any) taken as aforesaid; and what part thereof has been awarded for injury done to the adjacent lands in question; also to alter and modify his said award, if necessary, so far as the question of interest is concerned, and to amend his said award accordingly.

The arbitrator afterwards made a new award in which he awarded the same sum of \$8,782.41, but without interest, and he certified that no land had been taken; that no part of the sum awarded had been awarded for land taken, but that the same was so awarded for lands injuriously affected, etc.

In *Re Macpherson and The City of Toronto* (1895), 26 O. R. 558, there was land taken, and adjacent land, owned by the claimant, whose land had been taken was injuriously affected and the arbitrator in that case allowed a specific sum for each, that is, so much for the lands taken and so much more for the adjacent lands which were injuriously affected, and he added the two sums together and allowed interest on the whole from the date at which the claimants were entitled to have their compensation assessed; viz, the date on which the by-law, authorizing the work which caused the injury, etc.,—27th July, 1888,—was passed. The award was made on 11th March, 1895, and interest was allowed from the date of the passing the by-law, and this was appealed against.

There it was contended, as it is here, that interest should not have been allowed at all, but, at all events, it should be limited to that part of the award which had been allowed as purchase money, and not on that part of it which had been allowed as damages for land injuriously affected.

The learned Judge treated the whole sum allowed as purchase money, and dismissed the appeal—and I think he was right. I think it is a mistake to treat the amount of compensation to be allowed for injuriously affecting land—not

taken—differently from compensation to be allowed for ^{Judgment.} land actually taken. The act which caused the injury to ^{Robertson, J.} the claimant was not tortious, or illegal; it was one authorized by the Municipal Act, and therefore legal and warranted, and compensation, in the latter case, is not, in my opinion, to be treated as damages as for a wrong done.

It is contended, however, that it makes a difference where land has been taken from the same person whose adjoining land has been only injuriously affected. With great respect I cannot see the distinction. Supposing that in this case land had been taken which belonged to this claimant, would that fact give him a right to interest on the amount allowed for injuriously affecting the other lands? According to the decision in *Re Macpherson*, it would—but supposing McPherson only claimed for land taken and his neighbour, like Mr. Leak, claimed for injuriously affecting, etc., could it be satisfactorily argued that the neighbour was not entitled to interest? I do not see the logic of such an argument. I can see no difference whatever between the two—it is a case of compensation.

That compensation should be paid over to the claimant at the time he was entitled to have the amount assessed, and that was when the by-law was passed which authorized the work which caused the property to be injuriously affected. From that very moment the value of the property became depreciated to the extent allowed by the arbitrator.

The city could have avoided this claim for interest by tendering the amount as soon as it, by its by-law, declared that the work should be done. It had no right to inflict the injury and not be ready to pay compensation. Here the claimant was obliged to take the steps pointed out by the statute to compel the city to arbitrate, and the result was that nearly six years elapsed before the amount of compensation was fixed and determined. This money should have been in the pocket of the claimant six years ago; he was just as much entitled to it then as he was when the arbitrator fixed the amount by signing the award.

Judgment. On the whole case I cannot come to any other conclusion than that the appeal should be allowed, setting aside the several orders referred to in the notice of motion, and that the words "without interest," after the amount allowed or awarded, be struck out of the award and writing instead thereof "with interest from 16th day of March, 1891," without reference back, as provided by sec. 464 of the Municipal Act, R. S. O. ch. 223 ; and I think the city should pay the costs of this appeal as well as the costs of and incident to the several orders appealed from.

MEREDITH, J. :—

The Legislature has made no distinction between compensation for lands taken and for lands injuriously affected, the compensation is given in each case in the same enactment by the same words. Why then should we, in such a case as this, make any difference in the allowance or disallowance of interest ?

That question was asked several times during the argument, but as yet there has been no answer, of anything like a convincing character, to it.

In neither case is the municipality a wrong-doer ; and therefore it is not the case of assessing damages for a wrong done in either case. In cases such as this the owner of the land is deprived of, and the municipality acquires, by virtue of the statute, some right or interest in or respecting the land. It is not the case of a mere trespass to land in which the remedy is damages only ; if not authorized by statute it would be a case of the permanent cutting off of a right, pertaining to the land, in which the chief remedy would be an injunction.

In this particular case the municipality acquired and hold, and the owner is deprived of, rights of access to the land in question ; rights existing by virtue of ownership of, and in connection with, that land only. They might have been acquired by purchase in the ordinary way, and if they had been so acquired and the purchaser had gone

into possession of the rights, as this municipality has, can Judgment.
it be doubted that he would have been obliged to pay Meredith, J.
interest upon the purchase money? The municipality here
has taken from the owner rights appertaining to his land,
worth \$8,782.41 when taken, why should they, having
had these rights and thereby depreciated the land in value
to that amount, not pay interest upon it? If a purchaser
acquires a right of any character out of or upon any land,
and have possession of it, surely he is to pay interest upon
his purchase money from the time of such possession.

But even if the case were one of assessing damages for
a wrong done, the wrong would be a continuing one and
damages should be assessed down to the time of making
the award; and so the award as varied would be wrong.

It is, however, not a case of that kind, but the case of
what may be called a compulsory sale of rights in respect
of land, the price of which is the compensation awarded.

I would allow the appeal and restore the allowance of
interest in the award; there is no need for any reference
back to the arbitrator: see the Municipal Act, sec. 464,
R. S. O. ch. 223.

FERGUSON, J.:—

After having examined all the authorities and books
referred to by counsel, I am unable to discover any suffi-
cient reason for disturbing the present award.

I have not found any authority going to shew that
interest should be allowed upon mere unascertained dam-
ages, and damages in respect of lands "injuriously affected"
are, as I think, damages of this character.

In cases where lands are taken the compensation is pur-
chase money, the expropriation transaction being nothing
more or less than a forced purchase and sale, and it seems
that interest should be allowed upon such compensation or
purchase money from the date of the passing of the by-law,
the point of time at which any dealing with the land by
the owner, is first prevented.

Judgment. This seems very similar to allowing to a vendor as **Ferguson, J.** against his purchaser interest on the purchase money from the point of time at which the purchaser might safely have taken possession.

In *Re Macpherson and The City of Toronto* (1895), 26 O. R. 558 (see 566), the learned Judge, proceeding according to the method laid down in *James v. Ontario and Quebec R. W. Co.* (1886), 12 O. R. 624; (1887), 15 A. R. 1, for ascertaining the amount of the compensation to be paid for lands taken, included in such compensation the damages to the lands "injuriously affected," treating the whole as compensation for lands taken or purchase money.

This cannot be done here, because no lands have been taken, and no question as to the compensation or purchase money for lands taken can arise, and there is no ground for applying or adopting the method laid down in *James v. Ontario and Quebec R. W. Co.*

There is here the mere question of damages for injuriously affecting lands, and whether the word "damages" or the word "compensation" is used can, as I think, make no difference. The essence is damages for an injury to property, and, until the award, these damages were and remained unascertained in amount. I have seen no case that I think an authority for allowing interest on the amount before it is ascertained.

It was contended that the means of going from the lands in question to the highway was seriously interfered with or destroyed by the city, and that this was the equivalent of taking lands, and that so the case fell into the same position as *Re Macpherson and Toronto* above. Conceding that the right of access to a highway is a very important private right, as stated in *Pratt's Law of Highways*, 14th ed., at p. 98, yet it is plain to me that such right has in the present case been only injuriously affected and not taken.

I do not see my way to allowing the appeal and I think it should be dismissed with costs.

G. A. B.

ECKHARDT ET AL. V. LANCASHIRE INSURANCE COMPANY.

Fire Insurance—Variation from Statutory Conditions—"Co-insurance" Clause—"Not Just and Reasonable"—R. S. O. ch. 203, sec. 171.

The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for \$15,000, "subject to seventy-five per cent. co-insurance"—these words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink, among the variations of the statutory conditions, as follows:—"The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of \$42,120.17, the cash value of the property insured being \$115,000, and the whole amount of insurance upon it, including the \$15,000 named in the defendants' policy, \$70,000. The defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than the latter, but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy:—

Held, following *Wanless v. Lancashire Insurance Co.* (1896), 23 A. R. 224, that the "co-insurance" clause was a condition and a variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of sec. 171 of the Ontario Insurance Act, R. S. O. ch. 203, it was binding on the insured.

ACTION upon a fire insurance policy. The facts are **Statement.** stated in the judgment.

The action was tried at Toronto on the 14th September, 1898, before MEREDITH, C.J., without a jury.

W. Cassels, Q. C., and *A. W. Anglin*, for the plaintiffs.
Osler, Q. C., and *C. S. MacInnes*, for the defendants.

October 17, 1898. MEREDITH, C.J.:—

This action is brought to recover from the defendants \$1,700.53, the balance which, as is claimed by the plaintiffs, is due to them from the defendants in respect of the loss by fire sustained by the plaintiffs upon their stock in trade, against which loss they were insured by

Judgment. the defendants by their policy dated the 2nd January,
Meredith, 1896.
C.J.

The policy contains what is not very happily I think termed, but which I shall nevertheless for the sake of convenience hereafter refer to as, a "co-insurance" clause.

The form which the policy takes is, except in this respect, the usual one, and by it the defendants undertook, subject to the terms and conditions in the policy contained and those contained in their deed of settlement, to be subject and liable to pay to the insured, as the policy reads, "all such damage and loss which the said assured may suffer by fire not exceeding upon each head of insurance the sum or sums mentioned below, that is to say, on property described on printed form attached \$15,000, subject to 75 per cent. co-insurance." Then follow the statutory conditions and what are called "variations in conditions," and among the latter is the following, numbered 14: "The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained."

On the 29th April, 1897, and during the currency of the policy—it having been renewed on the 2nd January previous for a year from that date—the property insured was destroyed and damaged by fire, occasioning a loss to the plaintiffs of \$42,120.71. The cash value of the whole of the property insured was at the time of the fire \$115,000, and the amount of the insurance upon it was then, including the \$15,000 named in the defendants' policy, \$70,000.

It was admitted that the defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the

former being less, and I think I must assume substantially less, than the latter, so that a person desiring to effect an insurance with the defendants had a choice between two really alternative rates.

Judgment.

Meredith,
C.J.

It was also admitted that the plaintiffs had no actual knowledge of the fact just mentioned, except in as far as that knowledge was obtained from the terms of the policy, which, besides having the "co-insurance" condition printed in red ink among the variations, has on its face the words "subject to 75 per cent. co-insurance" printed in conspicuous letters in red ink.

Upon this state of facts, the question which has arisen is as to the proportion of the plaintiffs' loss which the defendants are under their policy liable to pay, the plaintiffs' contention being that the defendants are liable for a ratable proportion of the loss, according to the amount of the insurances on the property subsisting at the time of the fire, and the defendants' contention being that the ratable proportion is to be determined upon the basis of the property being insured to the extent of seventy-five per cent. of its cash value at that time.

The argument of the plaintiffs is that the defendants' policy is a contract to insure against loss to the extent of \$15,000, subject only, as far as the conditions are material to be considered for the purpose of the present inquiry, to the provisions of condition 9 of the statutory conditions, and that the "co-insurance" clause, irrespective of the place which it occupies in or upon the policy, is a variation of or addition to the statutory conditions, and that not being, as they contend it is not, a just and reasonable condition to be exacted by the defendants, within the meaning of sec. 171 of the Ontario Insurance Act, R. S. O. ch. 203, it is null and void.

The Court of Appeal had under its consideration the effect of the "co-insurance" clause in a case in which the present defendants were defendants, [*Wanless v. Lancashire Insurance Co.* (1896), 23 A. R. 224], and it was in that case held that the clause as contained in the policy

Judgment.
Meredith,
C.J.

which the defendants were sued upon was a condition and a variation of statutory conditions 8 and 9, and that not being printed on the instrument of contract in manner provided by sec. 169 of the Act, it was not binding on the insured.

In that case the clause was not, as it is in this, printed among the variations of the statutory conditions, but was contained in the body of the policy, and read as follows :

"Seventy-five per cent. co-insurance clause. It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that the assured shall maintain insurance on the property covered by this policy to not less than seventy-five per cent. of the value thereof, and that failing so to do, the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any loss."

I do not understand that the effect of this decision is to determine that the Insurance Act prevents an insurer contracting with the insured to bear, instead of the whole loss to the extent of the sum mentioned in the contract, a proportion of the loss bearing any ratio either to the amount of the whole loss or to the value of the property insured which may be agreed upon, or a proportion of the loss bearing, as in this case was intended, such a ratio to the whole loss as seventy-five per cent. of the value of the property insured at the time the loss should happen should bear to the sum named in the contract as the full limit of the insurers' liability.

Had the Court been able to read the contract—and a strong argument in favour of so reading it was, I think, presented—as a contract to indemnify the plaintiff against such proportion of the loss as seventy-five per cent. of the value of the stock in trade at the time of the happening of the loss bore to \$4,000 (the amount named in the policy), not exceeding in the whole \$4,000, I apprehend that the conclusion arrived at would have been different; but, viewing the contract as one simply to indemnify against the loss, limiting the liability of the defendants to \$4,000, the "co-

insurance" clause was treated as a condition further limiting that liability.

Judgment.

Meredith,
C.J.

I am unable to distinguish this from the *Wanless* case. If the co-insurance clause in the policy in that case was a condition, it seems to me that, *a fortiori*, the clause as contained in the policy sued on in this action is a condition, for in the policy the defendants have treated their bargain as a contract to indemnify against loss to the extent of \$15,000, and the "co-insurance" clause as a condition limiting that liability.

There remains to be considered the question whether, treating it as a condition, the provisions of the clause are "not just and reasonable" to be exacted by the defendants, and therefore null and void as against the insured.

I am bound to hold, following the *Wanless* case, that the clause is a variation of statutory conditions 8 and 9, and therefore not binding on the insured, if I find that it is a "not just and reasonable condition" to be exacted by the defendants.

It was argued on behalf of the plaintiffs that, being a variation of the statutory conditions relating to the same matter as that dealt with by statutory conditions 8 and 9, rendering them more onerous to the insured, it must be held to be, or that at all events it was for that reason *prima facie*, "not just and reasonable," and that there were no special circumstances in the case to overcome or displace that presumption.

I am unable to agree with this argument.

Apart from authority, it would appear to me that to read the Act as I am asked to read it would be practically to eliminate from it that part of it by which the right is expressly given to vary the statutory conditions, provided that the variations be printed as sec. 169 requires, and that the conditions as varied be not such that they must be held to be "not just and reasonable;" when this right is given in addition to the right, subject to the same qualification, to omit any of the statutory conditions or to add new conditions, it is, I confess, difficult for me to under-

Judgment.
Meredith,
C.J.

stand how it is possible to hold that the right to vary the statutory conditions is limited as the plaintiffs contend that it is limited.

As I read the Act, the set of conditions which it provides is made a part of every contract of insurance except in as far as the insurer may vary them in accordance with the provisions of the Act. He may vary any one or more of these conditions, he may omit any of them, or he may add new conditions, or he may do all three of these things together, provided that the statutory conditions, with the changes he makes by variations, additions, and omissions, in as far as they make the contract more onerous to the insured than it would be if it contained or was subject to the statutory conditions only, when brought to the test of their justice and reasonableness, be not found to be "not just and reasonable."

How is it possible to read the Act as making each and every statutory condition unalterable as to the matters dealt with by it, except in favour of the insured, when the right to vary is given to the insurer, qualified only, as I have already mentioned, and what reason is there for thinking that however just and reasonable such a change in favour of the insurer of a statutory condition may be in any particular case, it was intended that the Court or Judge should be bound to hold it to be "not just and reasonable?"

I must, however, no matter how strong my own opinion on this point may be, bow to the authority of any decided case in which the contrary view has been adjudged to be the correct one.

The decided cases, as I understand them, however, are not opposed to, but accord with, the opinion I have formed, although there are doubtless to be found in some cases expressions of opinion more or less strong in favour of the first proposition in the plaintiffs' argument.

The question arose in *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96. The Supreme Court of Canada had in that case affirmed the judgment of the

Court of Appeal dismissing an appeal from the judgment of the Court of Queen's Bench in favour of the plaintiffs, by which it had been determined that, according to the true construction of the Insurance Act, the contract of insurance sued on was subject only to the statutory conditions or to no conditions except such as might be implied by law ; but that view was held by the Judicial Committee not to be the correct one, and it was decided that the contract was subject to the conditions, statutory and otherwise, of the defendants' ordinary policies, as far, as to the latter, as they did not contravene the provisions of the Act. The ordinary policies of the defendants contained the statutory conditions and variations of them : among the latter one by which statutory condition 10 was varied so as to limit the weight of gunpowder allowed to be stored or kept to 10 lbs., instead of 25 lbs., which is the weight mentioned in this statutory condition. Having so decided, the question arose as to whether the Board should determine the question raised by the plaintiff as to the variation being "not just and reasonable," and that question is thus dealt with, p. 126 :—

Judgment.
Meredith,
C.J.

"For these reasons, their Lordships think that the judgment of the Court of Queen's Bench discharging the appellant's rule for setting aside the verdict for the plaintiff, and the judgments affirming it, ought to be reversed, but their Lordships do not see their way to decide the question which now arises, and was not determined by the Judge who tried the action, or by any of the Courts in Canada, whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property insured is just and reasonable. They think the rule *nisi* should be kept open, and the action remitted to the Court of Queen's Bench in order to the trial of this question, with a direction that the rule be disposed of according to the decision that may be come to upon it."

If, as contended by the plaintiffs, any variation of the statutory condition as to the quantity of gunpowder allowed to be kept, making the condition more onerous to

Judgment. the insured, must necessarily be held to be "not just and
Meredith, reasonable" because that matter was dealt with by the
C.J. statutory condition, the plaintiff's verdict must have been allowed to remain undisturbed, and the action of the board in remitting the case to the Court of Queen's Bench, in order that the question of the justice and reasonableness of the variation should be tried, must have been, as it appears to me, based upon the view that that was a question of fact to be determined upon the particular circumstances of the case.

After this decision, the rule *nisi* was set down for argument in the Queen's Bench Division, and was made absolute, and a new trial directed for the purpose of having the question as to the variation of the condition tried and determined.

The trial was had before Mr. Justice Patterson without a jury, and he held, after evidence taken, that the condition was a reasonable one, and gave judgment for the defendants.

This judgment was afterwards set aside and judgment directed to be entered for the plaintiff [*Parsons v. Queen Insurance Co.* (1882), 2 O. R. 45], a majority of the Court (Galt and Armour, JJ.,) holding that, as the defendants' agent had at the time the insurance was effected represented to the plaintiff that 25 lbs. of gunpowder were allowed to be kept, the variation was not a just and reasonable one. The Chief Justice (Hagarty) dissented.

The Chief Justice was of opinion that the variation was just and reasonable, and Mr. Justice Galt concurred in that view "as a general proposition," but thought that under the circumstances the defendants were not in a position to urge it in that case. Mr. Justice Armour concurred with Mr. Justice Galt in setting aside the judgment for the defendants and entering it for the plaintiff, the ground of his decision, in addition to that relied on by Mr. Justice Galt, being that the condition, being more onerous than the statutory condition relating to the same matter, was, for that reason, to be deemed not just and reasonable.

It is to be noted that the decision in favour of the defendants at the trial was by the same Judge whose language in other cases is referred to and relied on by Mr. Justice Armour as supporting his view as to the construction to be placed upon the Act. In my opinion, more weight is to be attached to the conclusion of Mr. Justice Patterson when the question was presented squarely for decision than to his general observations in cases which did not call for any adjudication upon it.

Judgment.
Meredith,
C.J.

I would refer also to the judgment of the Chief Justice, particularly to his observations on pp. 50 and 51, and especially to the following passages :

"There can be nothing in itself unreasonable that underwriters should limit the quantity of a highly dangerous article of merchandise kept in property insured by them. Once remove it from the category of unreasonable matters merely because it differs from the statutory provision on the same subject, it falls back, in my judgment, into the class of matters on which the contracting parties may mutually limit or extend their liability."

It seems to me highly improbable that the power to vary or add to statutory conditions was intended to confer on the insurer the right to do so only by making them less onerous to the insured ; that power he surely had without the Legislature giving it. Why should the power be so limited ? In terms it is unqualified except by the requisite that the variation or addition shall not be "not just and reasonable" to be exacted. The power, too, is given subject to the same qualification, to omit statutory conditions.

Why, for instance, should, under all circumstances and in every case, the insurer be bound to allow 25 lbs. of gunpowder to be kept on the premises ? Is he not to be at liberty in insuring a stock of highly inflammable goods to stipulate that no gunpowder, or a less quantity of it than 25 lbs., shall be kept on the premises ? Such a prohibition, without any consideration being given for its being introduced, might and probably would be unjust

Judgment. and unreasonable if the property insured were an isolated dwelling, while it would, I think, be just and reasonable if the subject of the insurance were a stock of highly inflammable goods.

Meredith,
C.J.

It is probable, I think, though it is not necessary for the determination of this case to decide the point, that with regard to the matters dealt with by the statutory conditions the intention of the Legislature was that what is found there should be taken to be that which *prima facie* should be the most that the insurer should be at liberty to exact from the insured, and that anything beyond that which should be exacted must stand the test of its not being found to be not just and reasonable in the circumstances of the particular contract in which it might be incorporated.

Applying this test, the "co-insurance" clause in this case cannot, I think, be said to be "not just and reasonable" to be exacted. The plaintiffs had the option of being insured without the clause if they chose to pay a higher rate of premium; they were satisfied to take the benefit of the lower rate, and in consideration of it to limit the amount of the insurers' liability to them. There was nothing unjust or reasonable in itself in the insurers saying to them: "We will not contract to indemnify you against the whole loss which you may sustain; we will limit our liability to a proportion of loss to be ascertained in the manner provided by our 'co-insurance' clause." That proportion is in substance and effect such proportion of the loss as seventy-five per cent. of the value of the stock insured at the time of the happening of the loss should bear to the amount named in the policy as the limit of the defendants' liability. If the policy had on its face limited the defendants' liability to two-thirds of the loss, it cannot be, I think, that statutory conditions 8 and 9 would have had the effect, in case there were other insurances on the property covered by the policy, of neutralizing that limitation and rendering the defendants liable to pay a ratable proportion of the whole loss, according to the amount of

the insurances which should be subsisting when the loss should happen. And if not, why should it do so where the limitation takes the form of a condition? The object of condition 9 was to prevent the insurer, in case of double insurance, being liable to pay the whole amount of the loss to the extent of the sum named in the policy as the limit of his liability, leaving him to look to the other insurer for contribution, and instead of that to require the insured, in such a case, to look to each insurer for payment of his ratable proportion of the loss, but not to enlarge in any respect the liability of the insurer beyond that which he had contracted to assume. To hold the "co-insurance" clause in this case to be void would be, in my opinion, to enlarge the defendants' liability beyond that which they contracted to assume and to give to condition 9 an effect which, as I had said, I do not think it was intended to have.

Judgment.
Meredith,
C.J.

It surely cannot be that an insurer may not stipulate that his contract shall cease to be binding if the insured does not maintain such an amount of additional insurance as it is a term of the bargain that he shall maintain as a condition of the insurers' liability under the contract continuing in force. What reason is there for thinking that the Legislature intended to so fetter the freedom of contract as to prevent that being done? None that I can find in the language which it has used. Nor does the history of what led to the passing of the Act, as detailed in the judgment of Mr. Justice Armour in the *Parsons* case, lead to any such conclusion. If then the insurer may contract that in the event of such a term of the contract being violated by the insured, his right under the contract shall be altogether at an end, *a fortiori*, the insured may stipulate that if it is violated he shall be in the same position as to his liability under the contract as if the additional insurance had been kept up.

The argument of the plaintiffs leads necessarily, I think, to the conclusion that the right to contract is so fettered as to prevent such a contract being entered into,—at all

Judgment. events where it happens that the insured effects additional insurance on the property but not to the amount which he has stipulated to maintain ; and if it be that the right to incorporate such a term in the contract is in the latter case taken away by statutory condition 9, and it is not taken away where no additional insurance is effected—for it is only by force of statutory condition 9 that it is argued that it is taken away—we should have the anomalous result that where there is a total breach of the agreement as to the additional insurance, the condition is good, but that where there is only a partial breach, it is null and void. Such a result can hardly have been anticipated or intended by the framers of the Act.

**Meredith,
C.J.**

The case of *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O. R. 358, if it does not support, is certainly, I think, as far as what was actually decided is concerned, not opposed to, the views I have expressed. The majority of the Court held in that case that a condition limiting the liability of the insurer to two-thirds of the actual cash value of the property insured at the time of the loss was a valid condition. My brother Rose was of opinion that the body of the contract was to be read simply as a contract to pay the amount of the insurance, although I gather from his observation at p. 368 that there was a clause in the body of the policy providing for the payment of the amount not exceeding two-thirds of the actual cash value of the property, and that the latter limitation was to be treated as a condition, but, finding among the variations of the conditions a similar provision, he held that it was a valid condition and binding on the insured.

The Chief Justice (Cameron) is reported to have said, p. 373 : “ If it were necessary to express an opinion on the point, I am not prepared to accept the view that it would not be competent for an insurance company in the body of its policy to limit the undertaking to pay two-thirds of the actual value of the loss only. That would be a different thing from fixing or adding a condition to modify the force and effect of the contract.” But he, too,

held that, treating the policy as a contract to pay the amount of the insurance simply, and the provision as to the two-thirds as a variation of the statutory conditions, it was a valid condition.

Judgment
Meredith,
C.J.

It is true that there was no other subsisting insurance so as to bring into operation the provisions of statutory conditions 8 and 9, and that a further variation by which it was sought, in case of further insurance "by the assured or any other party," to limit the defendants' liability to a ratable proportion of the two-thirds, was held to be not just and reasonable.

It was not, however, necessary for the decision of the case to determine that, as my brother Rose thought, every variation by which it is sought to bind the insured by terms more stringent or onerous than those attached by the statute to the same subject or incident is necessarily invalid, because the majority of the Court came to the conclusion that the variation was not just and reasonable, inasmuch as the effect of it was to subject the claim of the insured to reduction in consequence of the act of a stranger, done, it might be, without his knowledge or consent, and if the language of the variation would apply to a policy which in another case the Court had declared to be invalid, it was for that reason also not just and reasonable.

I refer also to *May on Insurance*, 3rd ed., pars. 13, 434, 438, and the cases there cited.

Upon the whole I am of opinion that the "co-insurance" clause, as embodied in the defendants' contract, is valid, and that, treating it as a condition, I cannot hold that it is a "not just and reasonable" condition, in the circumstances of this case.

The defendants having paid the full amount for which, in my opinion, they were liable under the contract, the plaintiffs' action fails, and it must be dismissed with costs.

E. B. B.

RE SUPREME LEGION SELECT KNIGHTS OF CANADA.

CUNNINGHAM'S CASE.

Life Insurance—Friendly Society—Liquidation—Master's Report—Practice—Notice of Filing—Appeal—Total Disability Benefit—Repeal of Provisions as to Assessments—Non-payment—Suspension—"Fixed Dates"—Time—Notice.

The provision of Con. Rule 769 that notice of filing a Master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute.

Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R. S. O. ch. 203, notice of filing the report given in the *Ontario Gazette* and other newspapers, pursuant to sec. 193 of that Act, is not tantamount to personal service.

Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and repealed by the society during the membership of the insured :—

Held, that he was bound by such action.

Baker v. Forest City Lodge (1897), 28 O. R. 238, 24 A. R. 585, followed.

By sec. 165 of R. S. O. ch. 203 it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given, as mentioned in sub-sec. (2), and default thereafter for not less than thirty days: the meaning of which is that in the case of assessments which by implication are of fixed amount, and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure.

By the constitution and rules of the society, the amount and frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble, according to the needs of the society :—

Held, that the assessments could not be regarded as "payable at fixed dates;" and as, in the case of the member whose standing was in question, the notices to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred.

Hartley v. Allen (1858), 4 Jur. N. S. 500, 31 L. T. O. S. 69, 6 W. R. 407, not followed.

Statement. AN appeal by Dinah Cunningham from a report of the local Master at St. Catharines disallowing the claim of the appellants as a creditor of the above-named friendly

society, an unregistered insurance corporation, in compulsory liquidation under the Ontario Insurance Act, R. S. O. ch. 203. Statement.

The appellant's claim was, in respect of a beneficiary certificate held by David Cunningham, deceased, to rank on the assets of the estate in the hands of the receiver for the sum of \$1,000 alleged to be due to her as beneficiary thereunder, or, in the alternative, to rank on the assets for the sum of \$500 alleged to be due to her as administratrix of the estate of the deceased in respect of a disability benefit under such certificate. The claims were disputed by the registrar of friendly societies and by the receiver.

The Master found that David Cunningham died on the 9th December, 1897, and that at the time of his death he was in default to the society for non-payment of dues and assessments levied on and payable under the certificate for the months of August, September, October, and November, 1897, respectively, whereby under the constitution and rules of the society he became suspended, and thereby disentitled to any benefits under the certificate; and he not having up to the time of his death applied for reinstatement or become reinstated, the appellant was not entitled to any benefits under the certificate.

The Master further found that on the 1st September, 1897, David Cunningham, then being in good standing as a member of the society, became totally disabled, and *prima facie* would have been entitled to receive the sum of \$500 under the certificate and section 311 of the constitution and rules of the society for 1896; but that, by a by-law or resolution passed by the society on the 25th March, 1897, assented to and approved by the registrar of friendly societies, under his hand and seal of office, and duly filed in the office of the provincial registrar on the 5th April, 1897, the said section 311 of the constitution and rules of 1896 was abrogated and repealed, and such repeal or abrogation thereby became final and conclusive against all claims for disability arising thereafter.

Statement. The appeal came on for hearing before BOYD, C., in Court, on the 15th October, 1898.

J. H. Hunter, the insurance registrar, and *D. F. MacWatt*, the receiver, who appeared in person to oppose the appeal, objected that the report was absolute before the appeal was launched.

A. B. Cunningham, for the appellant, contra.

By sec. 193 (1) of R. S. O. ch. 203 it is provided that "Where any report is made * * the receiver shall forthwith file the same * * and thereupon, in the *Ontario Gazette* and in a newspaper * * the receiver shall give notice of the date of filing; * *."

By Con. Rule 769, "Every report or certificate of a Master shall be filed and shall become absolute at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time."

The appeal was argued on the merits, subject to the objection, by the same counsel. The arguments and authorities are sufficiently referred to in the judgment.

October 31, 1898. BOYD, C.:—

The report of the Master made and filed on the 18th July, 1898, had not yet become absolute when this appeal was launched. The Insurance Act, R. S. O. ch. 203, sec. 193, and the Rule of the Supreme Court 769, are to be read together. Though the statute appears to contemplate that the official notice of filing the report given in the *Ontario Gazette* and other newspaper shall be tantamount to personal service as to all parties interested, that is not expressly said, and the result is that the provision of the Consolidated Rules whereby notice of filing is to be served upon the opposing party is a prerequisite in order to the report becoming absolute. Such notice by personal service was not given in this case, and on this ground an appeal is open, for Rule 771 makes the time for service and setting down

to run only from and after the date of the service of notice of filing. Judgment.
Boyd, C.

This clears the way to deal with the merits. So far as the claim for \$500 disability benefit is concerned, I agree with the finding of the Master that the provisions as to such payments were legally abrogated by the society during the membership of the deceased, and that he is bound by such action according to the principles approved in *Baker v. Forest City Lodge* (1897), 28 O. R. 238, and affirmed in appeal, 24 A. R. 585. See also *Smith v. Galloway*, [1898] 1 Q. B. 71.

Upon the other and larger claim, the appeal proceeded upon the ground that the provisions of the statute R. S. O. ch. 203, sec. 165, * controlled the constitution and rules of the society, and that by virtue of that section there was no legal suspension or forfeiture in this case. So far as I can gather from the papers, the Master proceeded upon the non-payment of assessments for the months of September, October, and November, 1897, as working *ipso facto* the suspension of the defaulter—who died on the 9th December, 1897. I do not at present see, from my perusal of the voluminous rules and by-laws and constitutions of different years, that any forfeiture can arise for non-payment of quarterly dues or *per capita* tax, and this

* 165.—(1) No forfeiture or suspension shall be incurred by any member of a friendly society, or person insured therein, by reason of any default in paying any contributions or assessment, except such as are payable at fixed dates, until after notice to the member stating the amount due by him, and apprising him that in case of default of payment by him within a reasonable time, not being less than thirty days, to the proper officer, to be specified in such notice, his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice. "Fixed date" in this sub-section shall include any numbered day, or any Monday, Tuesday (or as the case may be,) numbered, alternate, or recurring, of a stated month or months.

(2) For any purpose of this Act or of the rules of the society notice may be effectually given if written or printed notice is delivered, or by registered post prepaid is sent to the member, or left at his last known place of abode or of business, by or in behalf of the society.

Judgment. matter was not dwelt upon during the argument. I deal
Boyd, C. at present with the finding of the Master as to the effect of the non-payment of the assessments for the months named. The rules or sections of the constitution to be regarded are as follows:—Nos. 292, 312, 320, and 321.

292 fixes rates of assessments for all cases, graded according to age, and provides that, after payment of the advance assessment at entrance, the same amount shall be paid on each assessment legally levied on the certificate thereafter.

This member's age at entrance was twenty-six, and he was rated at fifty-five cents per month for a single assessment in respect of the \$1,000 insured from July, 1894, to June, 1897. These he paid, as appears by his individual book with the society. In July, 1897, this rate was increased for his age at entrance to sixty-six cents, and at this increased rate he paid in July and August, 1897. The failure to pay began in September, and continued till his death.

Section 312 regulates the levying of an assessment, and provides that whenever, in the opinion of the Supreme Recorder and the Supreme Legion Finance Committee, the condition of the Supreme Treasury renders it necessary to levy an assessment for the benefit of the beneficiary fund, or if the beneficiary fund on hand has been reduced to less than the amount standing to the credit of the advance assessment fund, the Supreme Recorder shall on the first day of the month levy as many assessments as may be required to settle all demands on the beneficiary fund, or to replace the advance assessment fund and all moneys temporarily borrowed from the reserve fund—said assessments in no one month to be more than three in number.

Section 320 provides for giving notice of the assessments thus: the Supreme Recorder shall cause to be mailed monthly to every member of the beneficiary department in good standing a copy of the official paper of the Order, which shall be the sole medium by which official notices to the membership, including notice of assessments levied on beneficiary certificates, shall be promulgated, and, if

mailed to the last known address of the member, shall be deemed sufficient notice to him.

Judgment

Boyd, C.

Then section 321 says that every member shall pay the amount due on said assessment or assessments within thirty-one days from the date of the assessment or assessments, and failing to pay within that time he shall stand suspended from the beneficiary department and all benefits thereof, without further notice.

In the September issue of the official organ appeared the following notice, dated the 1st September, 1897, and addressed to "every member of the Order":—"You and each of you are hereby notified that I have levied assessment number fifteen on all beneficiary certificates issued prior to that day. This amount must be paid to the collector * * on or before 1st October, 1897, or you stand suspended (see sec. 321)." In another notice given in the same organ (regularly published therein by the by-law of the Order No. 313), addressed to the "Recorder and Collector of every Legion," the above sections Nos. 292 and 312 are set forth at length.

Like notices appear in the October issue of the organ as to two assessments, Nos. 16 and 17, being then levied—i.e., a double assessment of sixty-six cents each. These are payable on or before the 1st November, 1897, and so in the November issue as to assessment No. 18, payable on or before the 1st December, 1897. There is evidence of a general course of mailing these official papers to all the members. The papers were put in wrappers addressed to each name on the list (of which this name, Cunningham, was one), and the whole batch would then be tied together and put up in the post office bags and sent by the city express to the post office.

The journal for September was mailed about the 28th September—that for October about the 15th October—and that for November some time in that month. This would be rather scant notice as to the assessment No. 15 payable on the 1st October, but would be rather better for those, Nos. 16 and 17, payable on the 1st November.

Judgment.**Boyd, C.**

But the grave question now arises whether this course of proceeding is repugnant to the statute; and it is so unless these assessments can be regarded as "payable at fixed dates."

The rules provide that the assessments are to be levied on the first of the month, and are to be paid within thirty-one days thereafter, *i.e.*, from the date of the assessment. So that, in this sense, the dates are fixed. But it is possible that a month or more should pass without any assessment being called for, and it is uncertain whether the assessment would be single or double or treble. There is no necessary sequence of calls or assessments at periodic fixed periods—all depends on the needs of the society and on the opinion or discretion of the administrative officers as to the months when and the amounts for which the levy shall be made. There is no requirement of the constitution that a call shall be made on the first of each month, and essentially nothing is fixed in the way of contribution or assessment until the financial needs of the society are passed upon under rule 312. Now, the meaning of the statute is that in the case of contributions or assessments which by implication are of fixed amount and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment. But if this periodicity of payment does not exist, then the statute intervenes and regulates the procedure.

This section, now R. S. O. ch. 203, sec. 165, was in force substantially in 1894, and before the deceased joined the society. It first appears in 55 Vict. ch. 39, sec. 40 (1892). The provision, briefly, is where the time of payment is not definitely fixed (*i.e.*, in the contract or in the by-laws of the society), there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given (as mentioned in sec. 165 (2)), and default thereafter for not less than thirty days. The notice to pay was here in each case much less than thirty days.

As to authorities, *Hartley v. Allen* (1858), 4 Jur. N. S. 500,

31 L. T. O. S. 69, and 6 W. R. 407, was relied on by the official registrar and the receiver. The argument of Mr. Jessel is given in 6 W. R., who contended that the dividends there in question were not coming due at fixed periods, because it might happen, as it had happened, that no dividend was declared; but Kindersley, V.-C., held the contrary under the provisions of the Apportionment Act, 4 & 5 Wm. IV. ch. 22. From the different reports of the case (and it does not appear in the regular reports), it is manifest that the decision was based upon a liberal construction being given to the statute in favour of apportionment (see *Llewellyn v. Rous* (1866), 35 Beav. 592). This decision (given in 1858) was questioned in 1863 by Page Wood, V.-C., in *Re Maxwell's Trusts*, 1 H. & M. 610, who said (p. 615):—"There seems to be room for much argument whether this (provision as to payments due at fixed periods) applies to dividends of trading companies which in one year may have profits to divide, and none in the next. However, I find it so decided by Kindersley, V.-C., and I am prepared to act on that view, so far as the *Alliance* shares are concerned, that being a company where the dividends were directed to be made payable in April and October in every year * * . Where half-yearly divisions are expressly prescribed * * by by-laws, the company must meet and declare something, if it is only that there are no profits to divide:" p. 617.

Judgment.
Boyd, C.

In 1861 Kindersley, V.-C., used language in *St. Aubyn v. St. Aubyn*, 1 Dr. & Sm. at p. 620, not quite in harmony with his holding in the earlier case. He says:—"Fixed periods mean, certain definite periods prescribed and pointed out by the instrument; such, for example, as the usual quarter days, or half-yearly days; but when the times of payment are altogether indefinite, depending not upon anything prescribed * * but only upon the will and pleasure of the party who is to make the payment, it appears to me that that is not a case within the terms 'made payable or becoming due at *fixed periods*.'" And a still better definition by Lord Selborne of "periodical payments" (a term which, in my opinion, might be used interchangeably with

Judgment. the phrase of our statute) thus:—"Payments which are
Boyd, C. made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation:" *Jones v. Ogle* (1872), L. R. 8 Ch. at p. 198. Here the uncertain element is the *how much* and the *how often*, depending on the discretion of the governing board; and, having in mind that not liberal but strict construction is to prevail in the case of provisions making for forfeiture, I cannot doubt that *Hartley v. Allen* should not be followed in this case.

This member, therefore, cannot be regarded as suspended or his rights forfeited for non-payment of assessments under sec. 321, and, if not, he would appear to be in good standing. Nothing in the rules defines what is meant by being in good standing, but he was treated as being so, inasmuch as the official papers were mailed to his address during his life.

The Master's report must be vacated in accordance with this judgment, and the name of the deceased entered as a member entitled to share in the assets for the \$1,000 insurance; and costs should go to the appellant.

E. B. R.

[DIVISIONAL COURT.]

MALCOLM V. PERTH MUTUAL FIRE INSURANCE COMPANY.

Malicious Prosecution—Reasonable and Probable Cause—Burden of Proof—Nonsuit.

In an action for the malicious prosecution of a charge of arson against the plaintiff:—

Held, affirming the judgment of ROSE, J., 29 O. R. 406, that the burden was on the plaintiff to shew that the defendants acted without reasonable and probable cause; and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited.

AN appeal by the plaintiff from the judgment of ROSE, *Statement*, J., *ante* 406, dismissing the action with costs.

The action was for malicious prosecution, the plaintiff having been prosecuted for arson.

The jury, in answer to questions, found that the officers of the defendant company honestly believed that the plaintiff had set fire to the building insured by the company, but that such belief was not under the circumstances reasonable; they further found that the officers of the company did not act upon such belief in causing the information to be laid and in causing the arrest of the plaintiff; and that they were actuated by improper motives in causing his arrest.

The appeal was heard by a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 6th October, 1898.

Brewster, for the plaintiff. There should be judgment for the plaintiff on the answers of the jury, there being evidence to go to the jury: *Hamilton v. Cousineau* (1892), 19 A. R. at pp. 222, 227; *Abrath v. North Eastern R. W. Co.* (1883), 11 Q. B. D. at p. 460; *Allen v. Flood*, [1898] A. C. 1; *Hauldrick v. Heslop* (1848), 12 Q. B. 267.

J. P. Mabee, for the defendants. The plaintiff has to establish malice and absence of reasonable and probable cause; if he does not do so he is properly nonsuited: *Brown v. Hawkes*, [1891] 2 Q. B. 718. The plaintiff has not proved a favourable termination or an abandonment of

Argument. the prosecution: Criminal Code, secs. 567-594. The defendants took all the proceedings under competent legal advice: *St. Denis v. Shoultz* (1898), 25 A. R. 131.

Brewster, in reply, referred to Stephen on Malicious Prosecution, pp. 43, 44; *Archibald v. McLaren* (1892), 21 S. C. R. 588, 592, 596; *Panton v. Williams* (1841), 2 Q. B. 169; *Hampton v. Jones* (1882), 58 Iowa 317.

November 10, 1898. BOYD, C. :—

The burden being on the plaintiff to shew that the defendants acted without reasonable and probable cause, I think the evidence of the plaintiff fails in that respect, and that enough appears to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein. They had affidavits from various persons, *primâ facie* credible, deposing to admissions of the plaintiff as to his having a hand in the fire, and though these are met by counter-affidavits of the plaintiff and his wife—yet they, as interested parties, could not be expected to carry as much weight as the information derived from others without such interest. The question is whether, upon these statements and counter-statements, the defendants acted unreasonably in giving greater credit to those adverse to the persons insured, and the proper conclusion is that they did not act unjustifiably. The point is not whether, with extra caution and research, they might have obtained more light on the subject, but whether, with what they had—repeated by many ear-witnesses as derived from the plaintiff—they acted with reasonable and probable cause in launching the prosecution. In this I agree with the ultimate judgment of the trial Judge; and altogether I would affirm his conclusion with costs.

ROBERTSON, J. :—

I would affirm the judgment of ROSE, J., for the reasons given by him, with costs.

E. B. B.

[DIVISIONAL COURT.]

ANDERSON ET AL. V. HENRY ET AL.

Distress—Rent—Delay in Sale—Distress Left on Demised Premises—Bond by Tenant—Abandonment—Goods in Custodiâ Legis.

Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties.

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary.

Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee.

McIntyre v. Stata (1854), 4 C. P. 248; *Roe v. Roper* (1873), 23 C. P. 76, and *Whimsell v. Giffard* (1883), 3 O. R. 1, distinguished.

Langtry v. Clark (1896), 27 O. R. 280, distinguished and not followed.

AN appeal by the defendants from the judgment of the Judge of the County Court of Wellington, who tried the action in that Court without a jury, in favour of the plaintiffs. Statement.

The action was brought by chattel mortgagees against the landlord of the mortgagors and his bailiff to recover damages for the wrongful seizing and taking away and conversion by the defendants of the mortgaged goods. The defendants justified the taking as a lawful seizure and sale of the goods under a distress for rent of the premises upon which the goods were.

The facts are stated in the judgment of BOYD, C.

The appeal was heard by a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 6th October, 1898.

E. F. B. Johnston, Q.C., for the defendants, contended that there had been no abandonment of the distress originally levied; that the goods were *in custodiâ legis* at the date of the plaintiffs' seizure under the chattel mortgage; and that the plaintiffs were aware, at the date of the seizure by them, that the goods in question were to be sold for rent

Argument. on the day following. He referred to and distinguished *Langtry v. Clark* (1896), 27 O. R. 280; *Whimsell v. Giffard* (1883), 3 O. R. 1; and *Roe v. Roper* (1873), 23 C. P. 76, upon the ground that there was in this case no cessation of the landlords' rights, the distress continuing all along without interruption. He also cited Foa on Landlord and Tenant, 2nd ed., p. 418. [BOYD, C., referred to *Bagshawes, Limited, v. Deacon*, [1898] 2 Q. B. 173.]

A. H. Macdonald, Q.C., and Drew, for the plaintiffs, relied on the cases sought to be distinguished by counsel for the defendants, and also upon *McIntyre v. Stata* (1854), 4 C. P. 248.

November 10, 1898. BOYD, C. :—

Under lease dated 13th October, 1893, Joseph Tyler and Lorenzo Tyler owed rent to the landlord and present defendant on 19th July, 1897—the date of the distress warrant—to the extent of \$476, being the arrears for some years.

The plaintiffs' claim to the goods and crops seized under this distress arises under a chattel mortgage from Joseph Tyler dated 30th March, 1897, to secure \$148, for which, with interest (\$151), a warrant was issued on the 1st October, 1897.

The following proceedings took place under the warrant for rent: A seizure of growing crops, hay and grain, etc., and of farm chattels, was made on the premises leased on the 19th July, 1897, and an inventory taken, a copy of which, with the usual notice of sale, was served on the tenants; advertisements of sale were posted on the gate of the farm and elsewhere announcing sale by public auction on the 9th August. No bidders attending, that sale was adjourned on the premises, and by written notice, till the 20th September. That day was chosen because the landlord thought that by that time the crop would be all cut and threshed, etc. Though the landlord remitted some of the rent afterwards, on account of the poorness of the crops, it

looked at this time as if both cattle and crops would be needed to satisfy the amount distrained for; and only one sale was desirable: *Piggott v. Birtles* (1836), 1 M. & W. 441. On the 20th September all cattle, etc., were gathered at the barn for purposes of sale, but again no bidders attended, and the sale was further publicly adjourned, by notice and writing, till the 4th October. To give greater publicity, large posters were issued and distributed and posted, fifty in all, setting forth the original distress on the 19th July, and all the adjournments.

Judgment.
Boyd, C.

Pending this last adjournment, and knowing of current distress and approaching sale, and with intent to get ahead of the landlord, the chattel mortgagee issued his warrant on the 1st October, and, upon seizing and attempting to remove the goods and cattle, his bailiff was informed of the claim for rent, but he nevertheless removed two of the cattle, which were afterwards retaken by the tenant, so that all were sold, after due appraisement, on the 4th October, upon the premises leased.

It is proved that the mortgagee knew of the distress for rent and the advertisements of sale, and it is proved that the landlord did not know of the chattel mortgage till the 1st October.

The facts chiefly relied upon by the plaintiffs are that the goods were left upon the leased premises in charge of the tenants from the 19th July, and a bond taken from them to the landlord's bailiff with this condition: "If we produce and keep and deliver the chattels and crops this day distrained, and will not remove or allow to be removed any of them from off the said premises, and the same shall be held for the said bailiff and safely delivered up to him whenever called for by him * * then this obligation to be void." This bond was mentioned at the time of each adjournment, and it may be taken that its provisions were continued between the bailiff and the tenants, with the landlord's assent.

Upon these facts two points are made: (1) that there was unreasonable and improper delay in selling the dis-

Judgment. trained goods, which enures to the benefit of the third person—the mortgagee—who is said to be not affected by the arrangement between landlord and tenant; and (2) that the bond is conclusive evidence that the goods were not *in custodia legis* under the distress, but given up to the tenants upon a collateral agreement—the effect of which is to free the goods distrained from the operation of the distress, and leave them open to be taken under the chattel mortgage.

Boyd, C.

The delay in sale does not appear to be material. It is very plain from the evidence that there was no collusion between landlord and tenant as against the mortgagee or anybody else. The arrangement to get time to sell was *bond fide* and with a view of realizing the best prices on cattle and crops. Indeed, so far as the crops are concerned, a sale could not be lawfully had till they had been harvested, unless the parties had acted under the Ontario statute, which is merely permissive and not compulsory: 11 Geo. II. ch. 19, secs. 8 and 9; 2 W. & M., sess. I., ch. 5, sec. 3; and R. S. O. ch. 170, sec. 36; *Owen v. Legh* (1820), 3 B. & Ald. 470.

But on the larger question it was said in *Harrison v. Barry* (1819), 7 Pri. 690, that a consent from tenant not to sell the distress for an indefinite period, and the leaving of the distress with the wife of the tenant for the purpose of her keeping possession on the premises, did not afford evidence of collusion as against the sheriff seizing under an execution. Again, it was held by Best, C.J., in *Fisher v. Algar* (1826), 2 C. & P. 374, that the goods distrained may be left on the premises (say for a month) at the request of the tenant, and that the goods of a third person on the premises (a lodger) would be bound by such an arrangement, if the landlord did not know which were the lodger's goods. These cases go to shew that the chattel mortgagee is not in a better position than the tenants in this case *quoad* the seizure; and that the delay does not prejudice the distress, if there is no fraud or collusion. Some lati-

tude is allowed in the time for selling: *Lynch v. Bickle* Judgment. (1867), 17 C. P. 549. What may be reasonable delay Boyd, C. is a question for the jury: *Pitt v. Shew* (1821), 4 B. & Ald. 208. In this case I think the delay is well explained and reasonable.

Perhaps this matter of delay in selling does not vitiate the proceedings because of the old law that the landlord is not obliged to sell at all, but may elect to hold the distress till he is paid: *Lehain v. Philpott* (1875), L. R. 10 Ex. 242.

Again, I do not think that the fact of taking this bond or "recepting the goods to the tenant," as it is sometimes called, is fatal to the landlord. The bond is not something independent of the distress, but ancillary to it and in furtherance of it. The terms of the bond shew that the goods were to be held for the landlord's bailiff. It was done to save expense and because the landlord had no place elsewhere for the goods. The tenor of this bond is different from that taken by the sheriff and set out in *McIntyre v. Stata* (1854), 4 C. P. 248, in which it was said that the owners left in possession were not mere servants or bailiffs of the sheriff, but were clothed with the exclusive and independent possession. That case recognizes that the tenant may be constituted caretaker of the goods as the bailiff's man, and that the two characters are not incompatible. The wife of the tenant was the custodian in the cases in 7 Pri. and 2 C. & P.

The question seems reduced to this, whether the taking of the bond was an abandonment of the seizure. That is a question of fact for the jury, and the evidence is overwhelming here that there was no intention to abandon. Indeed, as pointed out in *Rapelje v. Finch* (1856-7), 14 U. C. R. 249, 468, the defendant gave unequivocal evidence of his intention not to abandon the seizure, by taking the bond. The landlord may impound the distress, or otherwise secure it on the premises, by 11 Geo. II. ch. 19, sec. 10, and these last words are wide enough to cover a case like the present, where the goods are secured by leaving them with

Judgment.
Boyd, C.

the tenant as caretaker for the bailiff. Though the goods were distrained, and so in the custody of the law, the possession and property are in the tenant till the sale, and meanwhile the landlord has only an inchoate right in them: *King v. England* (1864), 4 B. & S. 782; *Kerby v. Harding* (1851), 6 Ex. 234; and *Rex v. Cotton* (1751), Parker 121. These goods I take to be in the custody of the law all along from the first act of distraint till the sale after appraisement on the 4th October.

The case may be simplified by starting from the 20th September, when the landlord entered upon the premises in order to sell the distress, and all the movable things were gathered together at the barn for that purpose by the bailiff. That was an overt act in continuance of the first taking, and was in every sense lawful as against the chattel mortgagee, who had not yet come into the field. Then the delay in selling, from that to the 4th October—a matter of a fortnight—affords no evidence of abandonment, so as to let the warrant under the chattel mortgage intervene. (See *Eldridge v. Stacy* (1863), 15 C. B. N. S. 458, where there were three weeks of inaction.) But the plaintiff here knew that there was no inaction; he had notice, and, as intimated by Littledale, J., in *Swann v. Falmouth* (1828), 8 B. & C. at p. 460, that would keep him on the level of the tenant.

As to the crops growing, it is pretty clear that no one was required to be kept in possession till they matured. It is enough that some indication of the distress be exhibited so as to notify those interested and the public that the property is in the custody of the law. Such a notice was given here by the advertisement posted on the front gate of the place: see *per Kelly, C. B.*, in *Ex p. Arnison* (1868), L. R. 3 Ex. at p. 61.

The Judge below relied on cases which are distinguishable on the facts. In *Roe v. Roper* (1873), 23 C. P. 76, the jury found that the tenant was constituted agent of the landlord to take possession of the goods under the warrant, but that nothing had been done after the seizure to further

execute the warrant. Here everything was done after the seizure to prosecute the warrant to completion; the distress was continued by advertisement and adjournment till the money was made; the transaction is single and continues from seizure to sale.

Judgment.
Boyd, C.

Whimsell v. Giffard (1883), 3 O. R. 1, turned on the fact that the landlord had made no distress, a fundamental fault which does not exist here. In *Langtry v. Clark* (1896), 27 O. R. 280, the single point of distinction is this, that there was, by arrangement with the tenant, a suspension of the distress from 15th July to 1st August, until which time the sale was not to be advertised, but it may be that this is not a material distinction. Our decision may not be in accord with that case, but, as both are cases of appeal from the County Court, it is our duty to give our own judgment, and not to follow the earlier decision, if we do not agree with it.

As compared with *Langtry v. Clark*, I take the better view of the law to be, that pending the distress the goods taken are in the custody of the law, if the arrangement for postponing the sale and the intermediate care of the property on the premises is fair, reasonable, and *bond fide* between landlord and tenant—though the possession remains with the tenant subject to the distress, of which the public are notified—so long as no fraud is on foot and no intention or contrivance exists to prejudice the subsequent claimant.

The law is thus summarized in Taylor on Landlord and Tenant, vol. 2, sec. 610: "No delay in proceeding to a sale of the property distrained will destroy the lien for rent, nor vitiate the proceedings, where there is no evidence of collusion between the landlord and tenant. And, as a reasonable time will be allowed for selling, the distrained goods are during such time in custody of the law, and protected from seizure under an execution."

While the judgment is reversed and the action dismissed with costs, it should be, I think, without costs of appeal, owing to the cases relied on by the Judge.

Judgment. ROBERTSON, J. :—

Robertson, J.

On the close of the argument I was of opinion that the judgment of the learned County Court Judge who tried the case could not be supported. The point here is, was there an abandonment of the seizure made under the distress warrant for rent at the time the plaintiffs took away the chattels in question? I was of opinion then, and, after considering the authorities cited by counsel on both sides, I am of opinion now, that there was no such abandonment. The goods and chattels seized remained in *custodiâ legis* from the seizure until the sale. They were seized on the 19th July, 1897, an inventory made, and on the same day they were advertised to be sold on the 9th August following, by printed and written notices of sale, three of which were put up by the bailiff. On the day appointed no bidders appeared. The sale was further postponed (for the sole reason that there was no one present to buy) until the 20th September, and written notices of the postponement were annexed to the original notices of sale. On the 20th September the bailiff went to the premises for the purpose of selling, and for that purpose only, but again there were no bidders, and in consequence of that fact the sale was again postponed until the 4th October, and then fifty large printed posters, reciting the seizure, the advertisement of sale, and the several postponements thereof, were posted up. On the 4th October there was a number of bidders, and the sale proceeded without anyone forbidding or protesting against it. The prices brought were satisfactory to all concerned.

Now, these are the facts connected with the seizure and sale, except that on the day of the seizure, to save expense, instead of taking off the goods seized or leaving a man in possession, etc., the bailiff took a bond from the two tenants, in the usual form, conditioned that, if the obligors produced and kept and delivered up all the said goods and chattels and crops that day distrained by the bailiff for the landlord, and would not remove or allow to be removed

any of them from off the premises, and would hold the same Judgment.
for the said bailiff and safely deliver up to him, whenever Robertson, J.
called for, then the obligation was to be void, etc.

Now, the distraint and sale were regular in every respect, but the plaintiffs contend that, by reason of the bailiff's taking the bond, there was an abandonment of the seizure, and that the plaintiffs, who were mortgagees of part of the goods in question, were justified in seizing under their chattel mortgage. I think the law is clearly set forth by the learned Chancellor in his elaborate and well considered judgment, which I have had the advantage of perusing, and in which I fully concur. The distinguishing feature in this case is that from the date of the seizure the goods were *in custodia legis*, having been, on and from that date, advertised publicly for sale, and it is clear that they were not sold on the first and second occasions because there were no buyers or bidders present. What was the bailiff or landlord to do under the circumstances, unless to postpone from time to time until bidders and purchasers could be induced to attend at the time advertised for the sale to take place? There was no fraud, no connivance between the landlord and the tenants, for the purpose of holding the goods against other creditors. The landlord had no knowledge of the plaintiffs' mortgage, nor does it appear that the bailiff had; there was no time given to enable the tenants to hold the property against creditors, the landlord or the bailiff. The condition of the bond was to "safely deliver up to him (the bailiff) whenever called for by him," etc.; there was no agreement, like there was in the case much relied on by the plaintiffs (*Langtry v. Clark* (1896), 27 O. R. 280,) to allow the bailiff to re-enter and take possession, etc., nor was there any agreement on the part of the landlord or bailiff with the tenants, or any request on the part of the tenants, not to advertise until a particular day, nor to release the bailiff from any action whatever, nor to pay any additional costs that might be incurred by reason of the goods being left with the tenant instead of proceeding at once to advertise and sell

Judgment. the goods, etc.—all of which shewed that the proceedings under the distress warrant were put off from the 16th July, the day of seizure, until the 8th August, when an advertisement of sale was prepared but not put up until the 9th, for a sale at a future day. So that there was nothing to shew, so far as the public could see, that until the 9th August the landlord had taken steps to distrain, or that the goods were *in custodia legis*. The facts are altogether different here; the goods were advertised on the day of seizure for a day not unreasonably distant, and so kept advertised *ex necessitate rei*, and not by reason of any fraud or collusion between the landlord and the tenants; and therefore the mortgagees have no right to say, "the goods mortgaged to us are no longer impounded under the law," as was held the mortgagee had a right to say in *Langtry v. Clark*, and in taking them, under the circumstances, were, in my opinion, guilty of committing a breach of the pound within the statute under which the action was brought.

I agree, therefore, that the judgment of the Court below should be reversed and the action dismissed with costs.

E. B. B.

WARD V. THE CORPORATION OF THE CITY OF TORONTO.

Landlord and Tenant—Covenant for Renewal—Compensation for Improvements—Time for Election.

Where a covenant in a lease to the effect that if, on the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew at a rental to be fixed as therein directed, went on to provide that if the lessors did not see fit to renew the lessee should receive compensation for his permanent improvements:—

Held, that in order to entitle the lessee to claim compensation for his improvements and refuse to accept a renewal lease, the lessors must have elected before the expiration of the existing term not to renew; and if they did not so elect the lessee was bound to accept a renewal lease if and when required so to do.

In a covenant for renewal contained in a lease made by **Statement.** the defendants, as lessors, to the plaintiff's assignor, as lessee, the terms of which covenant are set out in the judgment, there was a proviso that if the lessors did not see fit to renew they should pay the lessee or his assigns reasonable compensation in respect to buildings and permanent improvements, the amount of which should be determined by arbitration. This was a special case raising, firstly, the question what according to the true construction of the covenant the lessors had to do if they desired to avail themselves of the above proviso to evidence their wish not to renew, and secondly, whether what had taken place as stated in the case amounted to an election on the part of the defendants to renew which precluded them from availing themselves of the proviso.

It appeared that before the expiration of the term of the lease on October 1st, 1895, the plaintiff gave the defendants' council, through the solicitor of the latter, thirty days' notice in writing of his desire to take a new lease of the lands demised as provided for in the covenant. The defendants' committee on property which had charge of the different properties of the defendants, on January 30th, 1895, appointed on motion a sub-committee to which

Statement. should be referred all applications for renewals of leases in connection with the land on the Toronto Island under the control of the committee, for consideration and report through the committee to the council. This sub-committee decided that in their opinion the lease to the plaintiff should not be renewed, and pursuant to this resolution, the defendants' solicitor wrote to the plaintiff on September 28th, 1895, that the sub-committee on Island leases had instructed him to advise the plaintiff that the latter's lease would not be renewed. This decision, however, of the sub-committee was not reported to the committee on property, which, on January 16th, 1896, reported to council as to renewal rentals to be charged for certain leasehold lots, but made no reference to the plaintiff's land, and the council adopted the said report, and renewed the lease of the lots therein referred to. In December, 1896, the plaintiff's solicitor called on the defendants' solicitor in reference to the matter in question, and subsequently, on December 21st, 1896, the committee on property passed an order authorizing the defendants' solicitor to offer a renewal lease to the plaintiff at a certain rental, and that if such offer were not accepted an arbitration should be held forthwith, and also forwarded a special report to council recommending that a renewal of his lease on these terms be offered to the plaintiff, which report was adopted on December 29th, 1896. On January 5th, 1897, the defendants' solicitor wrote to the plaintiff's solicitor stating that the defendants would renew the plaintiff's lease at the rental stated, and asking whether the plaintiff would agree to this, or whether an arbitration would be necessary.

The question was whether the plaintiff was entitled to compel the defendants to pay him for the value of his buildings and permanent improvements under the terms of the lease, he contending that the defendants did not see fit to renew the lease, or whether the plaintiff was bound to accept a renewal lease at a rental to be agreed upon or fixed by arbitration.

The case was argued on May 5th, 1898, before MEREDITH, C. J. Argument.

Wallace Nesbitt, for the plaintiff, contended that the defendants were bound to elect either to renew, or else to pay the plaintiff for his improvements; that if they had done nothing, this amounted to an election not to renew: *Renoud v. Daskam* (1868), 34 Conn. 512; *Foa on Landlord and Tenant*, 2nd ed., p. 234; that there was in the case abundant evidence that the defendants had elected not to renew; and that if the plaintiff had refused to receive payment for his improvements on October 2nd, 1895, the day after the expiration of the lease, the defendants could have required specific performance on the ground that they had not seen fit to renew.

Fullerton, Q.C., for the defendants, contended that the sub-committee of the committee on property had no power to act for the council, and that there being no authority, it could not be said that the action of the sub-committee, or letter of the defendants' solicitors following upon it, had misled the plaintiff.

September 22nd, 1898. MEREDITH, C. J.:—

The plaintiff is assignee of the rights of the original lessee in part of lot 22 on plan 141, Toronto, demised by the defendant corporation to James McBrine by indenture of lease dated October 1st, 1874.

The lease is for a term of twenty-one years from October 1st, 1874, and contains a covenant on the part of the lessors for renewal in these words: "And the said lessors covenant with the said lessee * * that if at the expiration of the term hereby granted, or of any future term of twenty-one years, the said lessee, his executors, administrators, or assigns, shall be desirous of taking a new lease of the premises hereby granted for a further term of twenty-one years, having conformed to all the terms and conditions herein mentioned and set forth, and having

Judgment.
Meredith,
C.J.

given to the council of the said corporation thirty days' notice in writing of such desire, the said lessors will, at the costs and charges of the said lessee, his executors, administrators, or assigns, as aforesaid, grant such new lease for the further term of twenty-one years, from the determination of the present or existing lease, at such rental per foot per annum as the said premises shall then be worth, irrespective of any improvements made by the said lessee, his executors, administrators, or assigns, such value to be determined as hereinafter provided for determining the value of the lessee's improvements: provided that if the said lessors do not see fit to renew this or any future lease, the said lessee, his executors, administrators, or assigns, shall receive from the said lessors such reasonable sum as the buildings and permanent improvements made and erected by the said lessee shall then be worth; such value to be determined by three arbitrators, nominated in writing, for that purpose as follows." Then follow provisions for the arbitration, to which it is unnecessary to refer.

Two questions are raised on the case:

(1) As to what according to the true construction of the covenant the lessors must do if they desire to avail themselves of the benefit of the proviso to evidence their wish not to renew and when what is necessary to be done must be done.

(2) Whether what took place as stated in the case amounted to an election on the part of the defendant corporation not to renew, and a binding determination on its part which precluded it from availing itself of the benefit of the covenant.

Dealing with the second question first, I am of opinion that it must be answered in the negative.

The action of the sub-committee of the committee on property, and the communication from the defendants' solicitor to the plaintiff by its direction do not, in my opinion, bind the defendants. The decision of the sub-committee that the lease should not be renewed was, as the resolution appointing it shews, beyond its powers. By

that resolution its duty was limited to reporting its opinion as to what should be done to the committee on property, in order that that committee might report to the council, whose action was necessary in order to carry into effect the recommendation.

Judgment.
Meredith,
C. J.

It appears from the case that the sub-committee made no report as to the renewal demanded by the plaintiff, and no report as to it was made by the committee on property, and the matter of the renewal was never passed upon or even submitted to the council.

The fact that the committee on property reported on other cases of a similar character, recommending renewal of the leases, and that its report was adopted by the council, raises no inference against the defendants and does not help the plaintiff.

The action of the solicitor, to which I have referred, is not binding on the defendants. Whatever authority the solicitor had was derived from the sub-committee; and if that body had no authority to bind the defendants, it follows that the solicitor had none.

As to the first question, I am of opinion that in order to get the benefit of the proviso it was necessary that the defendants should make their election not to renew before the expiration of the term. It was conceded, and the authorities cited on the argument shew, that the lessee to entitle himself to the benefit of the covenant must give notice of his election to renew, at least thirty days before the expiration of the term. That notice being given, but for the proviso, the defendants would have been bound then, that is, at the expiration of the term, to grant the renewal lease; but the effect of the proviso is to enable them to avoid that liability at their own will. The same reasoning which led to the decisions that the notice of the lessee under such a covenant as that in question here, could not be given after the expiration of the lease leads, I think, to the conclusion that the thirty days are in this case the period within which the lessor's election is to be made (perhaps where the notice expires before the termi-

Judgment.
Meredith,
C.J.

nation of the lease, the lessor would be entitled at any time before the term ended, though after the expiration of the notice, to make his election). If this be not so, then I apprehend that a reasonable time after notice of the tenant's election would be the period. It is, I think, more likely that the parties contemplated a certain period than an uncertain one, and therefore that they did not intend the period perhaps theoretically certain, but practically uncertain, of a reasonable time, to govern. The defendant corporation, not having elected not to renew within the period mentioned, became, in my opinion, bound to renew at the expiration of the lease, if not at the expiration of the thirty days.

I therefore answer the questions submitted as follows

(1) Upon the facts submitted, the plaintiff is not entitled to compel the defendants to pay him for the value of his building and permanent improvements under the terms of the lease.

(2) But the plaintiff is bound to accept a renewal lease at such renewal rate as may be agreed upon between the parties, or fixed by arbitration, as is by the lease provided.

A. H. F. L.

[DIVISIONAL COURT.]

HEYD V. MILLAR, ET AL.

Chose in Action—Verbal Assignment—Subsequent Written Assignment—Priority on Fund.

A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity.

A married woman, as agent of her husband who was indebted for costs to a firm of solicitors instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member:—

Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made.

Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold.

Judgment of the County Court of the county of York reversed.

THIS was an appeal from a judgment of His Honour Statement.
Judge Morson, junior Judge of the county of York, on an interpleader issue.

The firm of Millar, Riddell & LeVesconte had been solicitors for one P. C. Allan, and he was indebted to them for certain bills of costs when the firm dissolved and LeVesconte was entrusted with their collection.

In an interview between the latter and the wife of Allan who had called in reference thereto, and who stated that she had full authority, she gave him instructions to try and sell a certain farm belonging to her husband, and told him that the costs of the late firm might be retained out of the proceeds as a first charge.

The farm was sold by a new firm called C. Millar & Co., one Millar a member of the old firm being the senior partner, and the proceeds came into their hands, when a claim was made on it by one Louis Heyd, under an assignment in writing from both P. C. Allan and his wife, executed after the farm had been sold and the proceeds were in the hands of C. Millar & Co.

Statement. Heyd then brought his action against C. Millar & Co., for the money, and the interpleader issue was directed in which Heyd was plaintiff and the old firm of Millar, Riddell & Levesconte were defendants and on the trial of which, judgment was given in favour of the plaintiff against the defendants.

From this judgment the defendants appealed and the appeal was argued on 7th September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, JJ.

W. R. Riddell, for the appellants. The evidence shews that Mrs. Allan, who had full authority, directed LeVesconte to retain the costs out of the proceeds of the land when sold. That was an equitable assignment of the fund. In any event the firm had a lien on the fund as the services in respect of the sale were rendered by a member of the old firm.

L. Heyd, contra. There are in law only two kinds of lien in cases like this: (1) Where the fund is realized and is the result of an action; and (2) Where papers are in the hands of solicitors; who have a lien in the one case on the fund and in the other on the papers for their unpaid costs. C. Millar & Co., the present solicitors, and who eventually sold the land, have no lien on the proceeds for the old firm's costs. The evidence shews there was a purchaser in view by LeVesconte at the time Mrs. Allan told him he could sell and retain the costs; but that purchaser did not purchase and that sale fell through. It was two years after when a sale was made, and it was made by different solicitors, viz., C. Millar & Co. There was no fund in existence at the time of Mrs. Allan's instructions and no fund resulted from the sale then proposed, which is necessary to support an equitable assignment: *Brown v. Johnston* (1885), 12 A. R. per HAGARTY, C.J.O., at p. 192; *Thomson v. Huggins* (1896), 23 A. R. 191; *Roddick v. Gandell* (1852), 1 D. M. & G., at p. 777. The contract, if any, was concerning land and should be in writing.

W. R. Riddell, in reply. The contract was not concerning land but concerning the proceeds of land: Brown on the Statute of Frauds, 5th. ed., par. 268, 269. See also Pomeroy's Equity Jurisprudence, 2nd ed., vol. 3, note on p. 1972; *Dickinson v. Marrow* (1845), 14 M. & W. 713. Argument.

November 1st, 1898. ROSE, J. :—

This case is not a difficult one as it seems to me, either upon the facts or the law. P. C. Allan was indebted to the claimants for the amount of certain bills of costs; the firm dissolved and the winding up of the business, including the collection of the accounts was entrusted to Mr. LeVesconte, one of the partners. He wrote demanding payment. Mrs. Allan, acting for her husband, as his attorney and, as she said, with "power to do everything in connection with the farm—it was full enough to dispose of the proceeds of the sale," called and said he was unable to pay and requested LeVesconte to endeavour to sell the farm, telling him that out of the proceeds he might retain the costs of the late firm "as a first charge."

The farm was sold and the money realized. These facts appear perfectly clear from the evidence of the plaintiff himself, from the evidence of LeVesconte, and from the cross-examination of Mrs. Allan. Upon these facts it is clear there was an equitable assignment. See cases collected in *Mitchell v. Goodall* (1880), 5 A. R., at p. 168, and especially *Dickinson v. Marrow* (1845), 14 M. & W. 713, which was cited by counsel for the claimants; also Pomeroy's Equity Jurisprudence, 2nd ed., vol. 3, notes to paragraph 1284. I extract the following sentence: "The English Courts hold that not only a present appropriation by order of a particular fund operates as an equitable assignment, but also a *promise* or *executory agreement* to apply a fund in discharge of an obligation has the same effect in equity."

A question was raised upon the trial as to whether this was not a contract concerning land. It is perfectly clear

Judgment. it was not. It was an agreement to apply the proceeds of land when sold : see *Stuart v. Mott* (1893), 23 S. C. R. 384 ;
Rose, J. Browne on the Statute of Frauds, 5th ed., paragraphs 268 and 269.

The claimants are therefore entitled to the money, and the appeal must be allowed with costs, and judgment entered for the claimants on the interpleader issue with costs.

MEREDITH, C.J.:—

I agree. A consideration was of course necessary to complete the equitable assignment of the fund, but that is supplied by the undertaking of LeVesconte to do the business of selling the land at the request of Mrs. Allan.

MACMAHON, J., concurred.

G. A. B.

[DIVISIONAL COURT.]

THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO

v.

FISKEN.

Ejectment—Landlord and Tenant—Parties—Judgment—Sub-tenants.

In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given against the tenant under which the sub-tenants must go out.

Judgment of **ARMOUR, C.J.**, reversed.

Statement. THIS was an appeal from a judgment of **ARMOUR, C.J.**

The plaintiffs had leased certain premises to the defendant and the rent being in arrear the action was brought to recover it and for possession of the premises under a clause for re-entry in the lease.

The premises were occupied by a number of sub-tenants of the defendants but they were not made defendants or brought before the Court in any way.

The plaintiffs moved for judgment on the pleadings and examination of the defendant and the motion was heard in Court on 28th April, 1898. Statement.

J. H. Moss, for the motion asked for judgment for the rent due and for possession of the premises.

The learned Chief Justice gave judgment for the rent but refused to give judgment for possession as it appeared sub-tenants were in actual possession: holding that the action as constituted was in the nature of an action of ejectment and that the parties in possession had not been brought before the Court.

From this judgment the plaintiffs appealed upon the grounds, that

1. The learned Chief Justice erred in holding that the action was improperly constituted.

2. The statement of defence admitted the defendant was in possession by his tenants and the plaintiffs were entitled upon such admission to judgment for the recovery of possession.

3. It was optional with the plaintiffs whether they would make the tenants of the defendant parties to the action or not and as they were numerous it was not a desirable or convenient practice to do so.

The appeal was argued on 7th September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE, and MACMAHON, JJ.

Aylesworth, Q.C., for the appeal. The evidence of the defendant shews he is in possession by sub-tenants. The plaintiff is entitled to judgment for possession against the defendant as well as for the rent. If no statement of defence is filed the plaintiff is entitled to judgment for possession: Form 141 Con. Rules. The old rule is laid down as early as 1806 in *Roe v. Wiggs*, 2 B. & P. N. R. 330, where it is said "the landlord may take a verdict

Argument. against his own tenant and sue out execution upon which the sheriff will turn the under-tenants out of possession."

A landlord may issue a writ against his tenant alone or against tenant and sub-tenants at his option. Since the Common Law Procedure Act, the old rule of serving the party in actual possession is changed: *Minet v. Johnson* (1890), 63 L. T. N. S. 507. See also Con. Rules 180-184.

October 31, 1898. The judgment of the Court was delivered by

MACMAHON, J.:—

The action which was commenced on the 3rd November, 1897, is to recover possession of certain lands and premises in the city of Toronto, and also to recover the amount of rent due in respect of the said premises from the 1st of July, 1896, and interest thereon.

The plaintiffs by indenture of lease, dated 30th May, 1894, demised the lands and premises mentioned in the statement of claim to the defendant for the term of nineteen years, to be computed from the 1st day of January, 1894, the rent payable being \$776 per annum, in quarterly payments of \$194 each. There is a proviso in the lease giving a right of re-entry if the rent remains in arrear and unpaid for thirty days.

Although the lease is between the plaintiffs and the defendant, the defendant in his statement of defence alleges that as executor and trustee under the will of John Fiskien, deceased, he is in possession of the lands and premises described in the statement of claim by his tenants.

The examination of the defendant for discovery was put in on the motion, in which he stated that he was in possession by his tenants who paid their rent to him, and admitted that eighteen months' rent was due and in arrear to the plaintiffs at the time of the commencement of the action.

Judgment was given by the learned Chief Justice in favour of the plaintiffs for \$1,241.37, being the arrears of rent and interest thereon; but he directed that the action in so far as it asked for possession of the lands and premises be dismissed, holding that the action was not properly constituted because the sub-lessees of the defendant were not parties to the action. Judgment.
MacMahon,
J.

The changes effected in the practice in actions for the recovery of possession of land, since the Common Law Procedure Act was superseded by the Judicature Act and the rules framed under it, were fully considered by the Court of Appeal in England, in *Minet v. Johnson* (1890), 63 L. T. N. S. 507, where the plaintiff brought his action against Johnson to recover possession of certain premises in London; judgment was signed for want of appearance, and the sheriff ejected one Hartley who was in possession but who was unaware of the action having been brought, and who claimed that he was not in possession under Johnson.

On an application by Hartley, shewing that he was in possession not under Johnson but by some independent title, an order was made setting aside the judgment in so far as it affected him, with liberty to him to appear and be added as a defendant.

Lord Esher, M. R., said, p. 507: "The writ was served on Johnson only, and he allowed judgment to go by default, which was an admission that, as between himself and the plaintiff, he was in possession and the plaintiff was entitled to turn him out. Then, in pursuance of a writ of possession the sheriff turns out of possession the persons on the premises and delivers possession to the plaintiff. If Hartley were a tenant of Johnson's of course he must go out; therefore to support his complaint now he must say that he had some independent right of his own. What then is his remedy? There has been a miscarriage of justice, and Hartley has a right to be heard, and he must be let in to assert his case. If he had taken his point before judgment had been signed, he would have

Judgment.
MacMahon,
J.

been treated as though he were a defendant in the action; if he has done so after judgment has gone by default, without his knowing anything of the former proceedings, he must then also be allowed to defend. But the judgment must not be set aside as between the plaintiff and Johnson; it can only be set aside so far as it concerns him (Hartley). That is what has been ordered here, but it is said that that is not enough. It is said that the proceedings were irregular because the writ ought to have been served on everyone actually in possession. Under the Common Law Procedure Act 1852, that was once the rule in actions of ejectment, but new rules have been made for the procedure in such actions, and they must now be followed. There is no question here of natural justice. The only person to be served with the writ of summons is the defendant who is named in it, and no doubt in ordinary cases that would be the person in possession. In case of mistake a procedure has been provided by Order XII., Rules 25 and 27, by which a person in possession not named as a defendant on the writ can come in and defend. If the judgment was set aside simply, Johnson would be able to come in and defend if he liked; therefore the judgment must be set aside, and also the writ of possession, only so far as it affects Hartley."

Lindley, L.J., said, p. 508: "On principle a person in actual possession ought to be made a defendant; but where this has not been done, Order XII., Rule 25, seems to me to point out what is the proper course of procedure. The moment the person in possession has done as he is there directed he is treated as a defendant in the action."

Bowen, L.J., said, p. 508: "Williams, J., has let in the applicant as a defendant in the action; and set aside so much of the judgment as affected him. The procedure which existed under the Common Law Procedure Act 1852 (15 & 16 Vict. ch. 76), sec. 168, (our C. L. P. Act, 19 Vict. ch. 43, sec. 220, R. S. O. 1877 ch. 51, sec. 2), has been dropped under the new system, and though there might

have been opportunities for obscurity by dropping that section, nothing is clearer than the present rules.”

Judgment.

MacMahon,
J.

Our Rules 181 and 183, correspond with Rules 25 and 27 respectively, of Order XII. of the English Rules. Rules 180, 181 and 183, provide as follows :

“ 180. Any person not named as a defendant in a writ for the recovery of land, may, without leave, appear and defend, by filing with his appearance an affidavit stating that he is in possession either by himself or his tenant (as the case may be), and if the possession is by his tenant, that the defendant named in the writ is his tenant. The affidavit may be according to form No. 18.

181. Where such an affidavit is not filed, any person not named as a defendant in a writ of summons for the recovery of land, may, by leave of the Court or Judge, appear and defend, on filing an affidavit shewing that he is in possession, either by himself or his tenant.

183. Where a person not named as defendant in a writ for the recovery of land enters an appearance according to the foregoing rules, the appearance shall be entitled in the action against the parties named in the writ as defendants; and the person so entering an appearance shall forthwith give notice thereof, and shall in all subsequent proceedings be named as a party defendant; and if such person appears and omits to give notice the plaintiff may proceed as in case of non-appearance.”

The admissions in the statement of defence and by the defendant on his examination shew that he is in possession by his tenants, and they being there as tenants under Fiskens must—as said by Lord Esher in the *Minet v. Johnson* case—“ of course go out.”

The law as stated in the *Minet* case in regard to under-tenants was laid down as early as 1806 in *Roe v. Wiggs*, 2 B. & P. N. R. 330; that being a case where under the Ejectment Act the landlord before issuing his writ of ejectment was required to give notice to his tenant to quit, and the tenant did quit as to so much of the land as was occupied by himself, and gave notice to his sub-tenants to quit also, which they did not do.

Judgment.**MacMahon,**
J.

It was at the trial objected on the part of the defendant that the sub-tenants were in possession of a portion of the premises at the time when the ejectment was brought. But it was held that ejectment could be maintained against him for so much as his under-tenants had not given up. And the plaintiff had a verdict.

Sir James Mansfield, C.J., on a motion to set aside the verdict said: "I never understood that it was necessary for a landlord to give notice to any one but his own tenant. If possession be not delivered up after such notice, the landlord may take a verdict against his own tenant and sue out execution, upon which the sheriff will turn the under-tenants out of possession."

The appeal must be allowed and judgment given for the plaintiffs for immediate possession of the lands mentioned in the statement of claim. The plaintiffs are entitled to the costs of the motion.

G. A. B.

END OF VOL. XXIX.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ABANDONMENT.

See DISTRESS, 2.

ACCIDENT.

Non-repair of Highway.]—*See* MUNICIPAL CORPORATIONS, 1, 3, 4, 5, 6, 8.

See NEGLIGENCE—STREET RAILWAYS.

ACTION.

Jurisdiction of Ontario Courts—Injury to Land in Another Province—Local or Transitory Action.]—The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land

upon which the house and furniture were situate :—

Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario Court ; but *aliter* as to the furniture, on abandonment of the claim for destruction of the house.

Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, [1893] A. C. 602, followed. *Campbell v. McGregor* (1889), 29 N. B. Reps. 644, not followed. *Brereton v. Canadian Pacific R. W. Co.*, 57.

Cause of.]—*See* JURISDICTION.

Continuance of.]—*See* DIVISION COURTS, 4.

Limitation of.]—*See* LIMITATION OF ACTION.

Notice of.]—*See* CONSTABLE.

Right to Continue.]—*See* COVENANT.

Right of.—See **TRADE UNIONS.**

See **INSURANCE, 2.**

ACQUIESCENCE.

See **LANDLORD AND TENANT, 1.**

ADMINISTRATION.

See **DEVOLUTION OF ESTATES ACT, 1, 2—HUSBAND AND WIFE.**

ADVANCEMENT.

Intestacy—Release by Son of Intestate—Claim by Grandchildren.—

A son, in consideration of his father conveying to him certain land, accepted it as an advancement, in lieu of and in full of all claims and demands against his father's estate either for wages or as one of his co-heirs or next of kin, and agreed that neither he nor his heirs would make any claim against the estate, nor attempt to set aside or invalidate any will or conveyance made by the father. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as co-heirs or next of kin of the grandfather to share in the estate of the latter :—

Held, the children took, if at all, *per stirpes*, i.e., as representatives of their father, and as he would have been precluded by the agreement from taking anything, so were the children.

Held, also, that the conveyance by the father to the son was an "advancement." *Re Lewis*, 609.

AFFIDAVIT.

Application to Take off Files.—
See **COSTS.**

Of Bona Fides.—See **BILLS OF SALE AND CHATTEL MORTGAGES, 1.**

See **DIVISION COURTS, 1.**

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See **DISTRESS.**

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ALTERATION.

Of Note.—See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

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See **BILLS OF SALE AND CHATTEL MORTGAGES, 1.**

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Lien On.—See **LIEN.**

APPEAL.

Admission of New Evidence.—
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To High Court.—See **COUNTY COURTS.**

To County Court.—See **MUNICIPAL CORPORATIONS, 9.**

To County Council.—See MUNICIPAL CORPORATIONS, 9 — PUBLIC SCHOOLS, 2.

To County Judge.—See ASSESSMENT AND TAXES.

To Court of.—See CRIMINAL LAW, 3.

Waiver.—See INSURANCE, 1.

See COSTS—INSURANCE, 7.

ARBITRATION AND AWARD.

Misconduct of Arbitrator—Consent—Arbitration—R. S. O. ch. 62, secs. 12, 35, 42—Consolidated Rule 652.—By section 12 of R. S. O. ch. 62, the Court may set aside an award when an arbitrator has misconducted himself, and by section 35 the Court has the same powers as to references under order as are by the Act conferred on it as to references out of Court. By Consolidated Rule 652 the Court may remit the case referred or any part back for further consideration.

When an arbitrator appointed in Court by consent of the parties improperly heard evidence behind the back of one of the parties which affected a portion of the award:—

Held, that under the above sections Rule 652 does not apply to the case of an arbitration ordered by consent in Court to an arbitrator selected and agreed on between the parties, and that the whole award must be set aside.

Semble, section 42 of the above statute gives a discretion to the Court setting aside an award to deal with the costs. *Kennedy v. Beal*, 599.

Payment of Award into Court.—See WATER AND WATERCOURSES, 3, 5.

Lands Injurious Affected—Compensation—Interest.—See MUNICIPAL CORPORATIONS, 11.

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ARREST.

See CONSTABLE—MALICIOUS ARREST AND PROSECUTION.

ASSESSMENT AND TAXES.

Municipal Corporations—Court of Revision—Appeal to County Judge—Assessor—Right to Appeal.—The appeal from the Court of Revision to the County Judge in a case where such Court allows an appeal by the party assessed, against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but must be by the corporation itself.

Judgment of ARMOUR, C.J., reversed, MEREDITH, C.J., dissenting. *Re British Mortgage Loan Co. of Ontario*, 641.

Repayment of Money Lent.—See MUNICIPAL CORPORATIONS, 2.

ASSIGNMENT.

Of Interest.—See COVENANT.

For Benefit of Creditors.—See BANKRUPTCY AND INSOLVENCY. — LANDLORD AND TENANT, 3.

ATTACHMENT OF DEBTS.

Division Courts—Wrong Primary Debtor—Similarity in Name—Recovery by Rightful Owner—R. S. O. (1887) ch. 51, sec. 195.—In an action to recover a deposit of money to the credit of the plaintiff with the defendants, it appeared that the whole amount had been innocently but wrongfully paid by the defendants into Court and also directly to the creditors of another person of the same name as the plaintiff, under garnishee proceedings in a Division Court:—

Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover, or to protect the defendants against his claim, and that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff:—

Held, also, that sec. 195 of R. S. O. 1887 ch. 51, only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person. *Andrew v. The Canadian Mutual Loan and Investment Co.*, 365.

AWARD.

See ARBITRATION AND AWARD.

BAILIFF.

Authority of.—*See* DISTRESS.

BANKRUPTCY AND INSOLVENCY.

1. *Preference—Impeaching—Time—Pressure—Voluntary Conveyance—Consideration—Untrue Statement—Proof of True Consideration—Onus—Statute of Elizabeth.*—

Where there was evidence of a request made to a person in embarrassed circumstances by one who had indorsed notes for him, for a conveyance of an equity of redemption in land, to secure the indorser against his liability, and the first proceeding taken to impeach the conveyance was a seizure of crops upon the land under an execution against the grantor, more than sixty days after the transfer was made:—

Held, that, there having been pressure, the conveyance could not be impeached as a preference.

But, the statement of the consideration in the conveyance being untrue, the onus was upon the grantee to prove beyond reasonable doubt that there was some other good consideration, and his own unsupported statement that such existed was insufficient, and the conveyance must be treated as voluntary, and therefore void under the Statute of Elizabeth. *Gignac v. Iler et al.*, 147.

2. *Unliquidated Claim—Double Value—Over-holding Tenant—4 Geo. II. ch. 28, sec. 1—Preferential Claim—Rent—R. S. O. 1897 ch. 147.*—A claim for damages against an over-holding tenant for double the yearly value of the land under 4 Geo. II. ch. 28, sec. 1, is an unliquidated claim, and therefore is not proveable against an estate in the hands of an assignee for creditors under R. S. O. 1897 ch. 147.

A landlord has no preferential claim for rent against such an estate, if there were no distrainable goods on the premises at the time of the assignment. *Magann v. Ferguson*, 235.

3. *Assignments Act—Ranking on Estate—Valuing Security—Party Primarily Liable—R. S. O. ch. 147,*

sec. 20.]—The provision of *sec. 20* of the Assignments Act, R. S. O. ch. 147, that “every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon,” means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security.

The substance not the form of the transaction is to be looked at, to ascertain whether the third party is primarily liable; and if it be found that he is, the debtor is then only secondarily liable. *Glanville v. Strachan et al.*, 373.

See DIVISION COURTS, 3.

BENEVOLENT SOCIETIES.

Subordinate Councils—Power to Waive Initiation—Relief Fund—R. S. O. 1877, ch. 167.]—A subordinate council of a friendly society, incorporated under R. S. O. 1877, ch. 167, has no authority to waive the requirements for initiation of members prescribed by the rules, where such initiation is a condition precedent to a claim on the relief fund of the society. *Hoefner v. The Canadian Order of Chosen Friends*, 125.

See INSURANCE, 7.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Addition of Maker's Name—Non-apparent Alteration—Holder in Due Course—58 Vict. ch. 33, sec. 63 (D.).

—In an action on a promissory note against several parties as makers it appeared that the name of one of the alleged makers was not signed by him or with his authority but was added to the note after some and before others of the makers had signed it before the note came to the hands of the plaintiff, a holder for value:—

Held, that the plaintiff being the holder of the note in due course and the alteration not being apparent he could avail himself of it as if it had not been altered under the proviso to *sec. 63* of the Bills of Exchange Act 1890, 58 Vict. ch. 33 (D.).

Reid v. Humphrey (1881), 6 A. R. 403, distinguished. *Cunnington v. Peterson et al.*, 346.

Illegality—Stifling Prosecution.]
—See CONTRACT, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Validity of—Security Taken in Name of Trustee—Affidavit of Bona Fides—Conversion of Goods—Damages—Measure of—Amendment—Adding Claim—Pleading.*]—A chattel mortgage to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged chattels, it was contended that the mortgage was invalid because the mortgagee could not properly make the usual affidavit of *bona fides*, as there was no debt due to him:—

Held, notwithstanding there was nothing on the face of the mortgage to shew the fiduciary position of the

mortgagee, that the mortgage was valid.

Brodie v. Ruttan (1858), 16 U. C. R. 209, applied and followed.

At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power:—

Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods. *Light v. Hawley*, 25.

2. *Omission to Renew—Mortgagee Taking Possession—Sufficiency of—Seizure by Execution Creditor—57 Vict. ch. 37, secs. 38-40 (O.).*—A mortgagee having omitted to renew a chattel mortgage, delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining

premises, taking from them an instrument under seal whereby they acknowledged that they had received the goods under and by virtue of the warrant from him, and undertook to deliver them to him on demand. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question:—

Held, that what had taken place did not constitute such a taking of possession as is required by the statute.

Per MEREDITH, C.J.—In any event, the act of taking possession after the time for renewal has expired must amount to a new delivery or new transfer by the mortgagor.

Per MEREDITH, C.J., also.—A creditor, prior to the placing of his execution in the sheriff's hands, has no *locus standi* to attack a mortgage invalid for want of renewal.

Clarkson v. McMaster (1895), 25 S. C. R. 96, commented on.

Per MEREDITH, C.J., also.—Sections 38 and 40 of 57 Vict. ch. 37 (O.), do not apply to a mortgage which has ceased to be valid for want of renewal. *Heaton v. Flood*, 87.

3. *Renewal Statement—Assignment between Making and Filing—R. S. O. ch. 148, sec. 18.*—A chattel mortgage does not cease to be valid as against creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment.

Construction of sec. 18 of R. S. O. ch. 148. *Daniel v. Daniel et al.*, 493.

See DISTRESS, 2.

BOND.

Maintenance—Penalty—Right to Sue for Support.—The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to and is not satisfied by payment of the amount of the penalty, and the obligee has the right to sue for her support as it accrues from time to time. *Baker v. The Trusts and Guarantee Co. et al.*, 456.

By Tenant for Goods Distrained.—*See* DISTRESS, 2.

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BRIDGE.

Improper Construction of.—*See* STREET RAILWAYS, 2.

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Agar-Ellis, Re (1878), 10 Ch. D. 49, 71, specially referred to.]—*See* PARENT AND CHILD, 2.

Armour v. Kilmer (1897), 28 O. R. 618, followed.]—*See* SOLICITOR.

Attorneys and Solicitors Acts, Re (1875), 1 Ch. D. 573, followed.]—*See* SOLICITOR.

Bailey, Re (1879), 12 Ch. D. 268, followed.]—*See* WILL, 5.

Baker v. Forest City Lodge (1897), 28 O. R. 238, 24 A. R. 585, followed.]—*See* INSURANCE, 7.

Ball v. Warwick (1888), 50 L. J. N. S. C. L. 328, followed.]—*See* SOLICITORS.

Bayley v. Great Western R. W. Co. (1884), 26 Ch. D. 453, referred to.]—*See* WAY, 1.

Brodie v. Ruttan (1858), 16 U. C. R. 209, applied and followed.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

Cameron v. Bradbury (1862), 9 Gr. 67, followed.]—*See* SALE OF LAND.

Campbell v. McGregor (1889), 29 N. B. Reps. 644, not followed.]—*See* ACTION.

Cartwright, Re (1889), 41 Ch. D. 532, followed.]—*See* WASTE.

Chapel House Colliery, Re (1883), 24 Ch. D. 259, distinguished.]—*See* COMPANY, 1.

Clarkson v. McMaster (1895), 25 S. C. R. 96, commented on.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2.

Clendenan v. Blatchford (1888), 15 O. R. 285, followed.]—*See* WAY, 3.

Companhia de Mocambique v. British South Africa Co. [1892], 2 Q. B. 358; [1893] App. Cas. 602, followed.]—*See* ACTION.

Cowling v. Dickson (1880), 45 U. C. R. 94; 5 A. R. 549, discussed.]—*See* LANDLORD AND TENANT, 1.

Derry v. Peek (1889), 14 App. Cas. 337, followed.]—*See* LANDLORD AND TENANT, 1.

Edge v. Boileau (1885), 16 Q. B. D. 117, followed.]—*See* LANDLORD AND TENANT, 1.

Finlay v. Miscampbell (1890), 20 O. R. 29, followed.]—*See* NEGLIGENCE.

Foley v. Township of East Flamborough (1898), 29 O. R. 139, distinguished.]—*See* MUNICIPAL CORPORATIONS, 8.

Fraser v. Ryan (1897), 24 A. R. 441, followed.]—*See* SALE OF LAND.

Graff v. Evans (1881), 8 Q. B. D. 373, distinguished.]—*See* INTOXICATING LIQUORS, 2.

Hartley v. Allen (1858), 4 Jur. N. S. 500, 31 L. T. N. S. 69, 6 W. R. 407, not followed.]—*See* INSURANCE, 7.

Haseler v. Lemoyne (1858), 5 C. B. N. S. 530, followed.]—*See* DISTRESS, 1.

Howe v. Smith (1884), 27 Ch. D. 89, followed.]—*See* SALE OF LAND.

Jones v. Merionethshire Permanent Building Society, [1891] 2 Ch. 587, followed.]—*See* CONTRACT, 1.

Kennedy v. Protestant Orphans' Home (1894), 25 O. R. 235, followed.]—*See* WILL, 3.

Koch v. Wideman, Re (1894), 25 O. R. 262, followed.]—*See* WILL, 2.

Langtry v. Clark (1896), 27 O. R. 280, distinguished and not followed.]—*See* DISTRESS, 2.

Lewis v. Read (1845), 13 M. & W. 834, followed.]—*See* DISTRESS, 1.

Lound v. Grimwade (1888), 39 Ch. D. 613, followed.]—*See* CONTRACT, 1.

Mahony v. East Holyford Mining Co. (1875), L. R. 7 H. L. 869, followed.]—*See* COMPANY, 2.

Martindale v. Clarkson (1880), 6 A. R. 1, distinguished.]—*See* DOWER.

Morris v. Edgington (1810), 3 Taunt. 31, referred to.]—*See* WAX, 1.

McIntyre v. Stata (1854), 4 C. P. 248, distinguished.]—*See* DISTRESS, 2.

Newton, Re, [1896] 1 Ch. 740, specially referred to.]—*See* PARENT AND CHILD, 2.

Paradis v. Bossé (1892), 21 S. C. R. 419, followed.]—*See* SOLICITOR.

Parcell v. Grosser (1885), 1 Atl. R. 909, followed.]—*See* INSURANCE, 4.

Rawlings v. Coal Consumers' Association (1874), 43 L. J. M. C. 111, followed.]—*See* CONTRACT, 1.

Regina v. Williams (1897), 28 O. R. 583, not followed.]—*See* CRIMINAL LAW, 3.

Reid v. Humphrey (1891), 6 A. R. 403, distinguished.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

Rigby v. Connol (1880), 14 Ch. D. 28, followed.]—*See* TRADE UNIONS.

Roe v. Roper (1873), 23 C. P. 76, distinguished.]—*See* DISTRESS, 2.

Sherwood v. City of Hamilton (1875), 37 U.C.R. 410, followed.]—
See MUNICIPAL CORPORATIONS, 8.

Tanqueray—Willame and Landau, Re (1882), 20 Ch. D. 476, followed.]—See WILL, 5.

Tremble v. Miller (1892), 22 O.R. 500, followed.]—See DIVISION COURTS, 2.

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Wagstaff v. Wilson (1832), 4 B. & Ad. 339, referred to.]—See DISTRESS, 1.

Wanless v. Lancashire Ins. Co. (1896), 23 A.R. 224, followed.]—
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Ward v. Ward (1871), L. R. 6 Ch. 789, distinguished.]—See LIMITATION OF ACTIONS, 1.

Whimsell v. Giffard (1883), 3 O.R. 1, distinguished.]—See DISTRESS, 2.

Windhill Local Board of Health v. Vint (1890), 45 Ch. D. 351, followed.]—See CONTRACT, 1.

Wood v. Ontario and Quebec R. W. Co. (1874), 24 C. P. 334, commented on.]—See COMPANY, 2.

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CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

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CHARGE.

Legacy.]—See WILL, 1.

CHARITIES.

Gift to.]—See WILL, 3.

CHILD.

See PARENT AND CHILD.

CHOSE IN ACTION.

Verbal Assignment — Subsequent Written Assignment — Priority on Fund.]—A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity.

A married woman, as agent of her husband who was indebted for costs to a firm of solicitors, instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member :—

Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were

entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made.

Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold.

Judgment of the County Court of the county of York reversed. *Heyd v. Millar et al.*, 735.

CHURCH.

Playing Music Outside of.]—See NUISANCE.

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Steward of.—Selling Liquors Without License.]—See INTOXICATING LIQUORS, 2.

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See SOLICITOR—LANDLORD AND TENANT, 4—MUNICIPAL CORPORATIONS, 11.

COMPANY.

1. *Winding-up Order—Proof of Assets—Unpaid Stock—Stock Issued as Paid Up—Bonds.*]—A winding-up order will not be granted where there are no assets, and the petitioning creditor would therefore get nothing by the order. Where, however, on a petition for such an order, which was contested on the ground

of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partially paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted winding up the company.

In re Chapel House Colliery Co. (1883), 24 Ch. D. 259, distinguished. *In re Georgian Bay Ship Canal and Power Aqueduct Co.*, 358.

2. *Contract Made by Director—Authorization—Informality—Sale of Undertaking—Purchase Money—Equitable Charge Upon.*]—The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company:—

Held, that the plaintiff was entitled to recover from the company the value of his work.

Mahony v. East Holyford Mining Co. (1875), L. R. 7 H. L. 869, followed.

Wood v. Ontario and Quebec R. W. Co. (1874), 24 C. P. 334, commented on.

The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into Court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the Court and being willing that the judgment debt should be paid out of the fund in Court; an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs and of the costs of the two directors out of such fund. *Allen v. Ontario and Rainy River R. W. Co. et al.*, 510.

CONSIDERATION.

Illegality.—See CONTRACT, 1.

Of Agreement to Discharge Tenant.—See COUNTY COURTS.

CONSTABLE.

Arrest—Warrant of Commitment—Execution Outside of Magistrate's Territorial Jurisdiction—Absence of Backing—Insufficient Notice of Action—R. S. O. (1887) ch. 73—24 Geo. II. ch. 44, sec. 6.—It is not necessary to the execution of a warrant of commitment by a constable that he should actually lay hands on or physically interfere with the person to be arrested. It is an arrest if the person to be arrested asks for and peruses the warrant and agrees to accompany the constable: and, *semble*, it is sufficient if he

agrees to accompany the constable on his statement that he has the warrant in his possession.

A constable executing a warrant in good faith outside of the territorial jurisdiction of the magistrate issuing the same, without procuring the indorsement of a magistrate of the county where the arrest is made, is entitled to notice of action and to the protection of R. S. O. (1887), ch. 73.

A notice of action which wrongly states the name of the township in the county in which the arrest took place is insufficient.

A constable in an action against him for wrongfully arresting the plaintiff without a proper indorsement of the warrant by a magistrate of the county in which the arrest is made is entitled to plead "not guilty by statute."

A constable is not entitled to the protection of 24 Geo. II. ch. 44, sec. 6, unless there is want of jurisdiction in the magistrate issuing the warrant. *Alderich v. Humphrey and Young*, 427.

CONSTITUTIONAL LAW.

See RAILWAYS, 2.

CONTRACT.

1. *Consideration in Part Illegal—Stifling Prosecution.*—The manager of the business of an insolvent firm was arrested and imprisoned on a charge of having procured the firm, while in insolvent circumstances, to transfer certain of its property to another person with intent to defraud the creditors of the firm. After he had been released on bail an offer was made in writing

by his wife and her son to the creditors of the firm to pay a certain percentage of their claims, in addition to the dividend to be paid by the estate of the firm, and to withdraw certain actions and procure the abandonment of certain claims, upon conditions set out in the offer, one of which was that any creditor accepting the offer should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. This offer was accepted by the plaintiff and a number of the other creditors. After it was made, the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage. In an action by one of the creditors upon some of the notes:—

Held, that, although not stated in express terms, one object of the defendants in making their offer was to procure the stifling of the prosecution of the charge made against the husband; that it was in accordance with the concluded agreement made by the defendants with the plaintiff and the other creditors that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given on the illegal agreement thus entered into, could not be enforced.

Rawlings v. Coal Consumers' Association (1874), 43 L. J. M. C. 111; *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351; and *Jones v. Merionethshire*

Permanent Benefit Building Society, [1891] 2 Ch. 587, followed.

Held, also, that as part of the consideration for the agreement was illegal, the whole was bad.

Lound v. Grimwade (1888), 39 Ch. D., at p. 613, followed. *Leggatt v. Brown et al.*, 530.

2. *Specific Performance—Agreement to Bequeath Estate—Remuneration for Maintenance—Implied Promise—Annual Payments—Arrears—Statute of Limitations.*]—The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons:—

Held, that, apart from the Statute of Frauds, the evidence was not such as the Court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a

properly executed will had been produced and proved before it.

Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross v. Cleary et al.*, 542.

Agreement to Accept Land in Lieu of Claim Against Estate.—See **ADVANCEMENT**.

Breach of.—See **WATER AND WATERCOURSES**, 4.

Parol—Fire After Contract.—See **INSURANCE**, 4.

See **COMPANY**—**LANDLORD AND TENANT**, 1—**PARENT AND CHILD**—**RAILWAYS**, 1—**SOLICITOR**.

CONVEYANCE.

Voluntary.—See **BANKRUPTCY AND INSOLVENCY**, 1.

CONVICTION.

Order Nisi to Quash—Death of Prosecutor After—Effect of.—The death of the prosecutor, who is also informant, after a summary conviction, before the service on him of an order nisi to quash, does not prevent the Court from dealing with the matter and from quashing the conviction. *Regina v. Fitzgerald*, 203.

For Selling Liquor Without License.—See **INTOXICATING LIQUORS**, 2.

See **CRIMINAL LAW**, 5, 8.

CORPORATIONS.

See **COMPANY**.

COSTS.

Unsuccessful Application to Take an Affidavit off the Files—Criminal Code, secs. 897, 898—Weekly Court—Appeal—Jurisdiction.—The costs referred to in secs. 897 and 898 of the Criminal Code are those dealt with by the General Sessions of the Peace, when a conviction or order is affirmed or quashed on appeal to it; but the above sections are not applicable to the costs of an unsuccessful application to a Judge of the High Court to take an affidavit off the files, after a conviction has been moved by *certiorari* into that Court.

After the removal of a conviction into the High Court, the convicting magistrate moved to have an affidavit filed by the defendant, removed from the files of the Court, which was refused with costs payable by the magistrate to the defendant. Subsequently, under the belief that secs. 897-898 of the Code applied, the defendant obtained an *ex parte* order varying the previous order by making the costs payable to the clerk of the peace and then to the defendant, and an appeal from such amended order by the magistrate to the Judge sitting in Weekly Court, was dismissed; the magistrate then appealed to the Divisional Court from the order of the Judge of the Weekly Court, and, also, by leave, direct from the above amended order, when the former appeal was dismissed and the latter allowed.

The Judge sitting in Weekly Court has no jurisdiction to entertain an appeal from an order of a Judge of

the High Court made in a criminal proceeding. *Regina v. Graham*, 193.

County Court.]—See RAILWAYS, 1—SOLICITOR.

See ARBITRATION AND AWARD.

COUNTY COURTS.

Order in Term—Reversal of Verdict—Jurisdiction—Rule 615—Appeal to High Court—R. S. O. ch. 55, sec. 51—Landlord and Tenant—Cotenant—Release of One—Agreement—Consideration.]—In a County Court action tried with a jury, a verdict was found for the defendant and judgment in his favour ordered by the trial Judge. Upon motion by the plaintiff to set aside the verdict and judgment and to enter judgment for the plaintiff or for a new trial, the County Court, in Term, made an order setting aside the verdict and judgment and ordering judgment to be entered for the plaintiff:—

Held, that, under the provisions of sec. 51 of the County Courts Act, R. S. O. ch. 55, an appeal by the defendant from the order of the County Court, in Term, lay to a Divisional Court of the High Court.

The County Court Judge, in Term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute.

In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence

of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge. *Donaldson v. Wherry et al.*, 552.

Jurisdiction of Judge of.]—See MUNICIPAL CORPORATIONS.

COURT.

Discretion of.]—See PARENT AND CHILD, 2.

Of Record.]—See CRIMINAL LAW, 8.

Of Revision.]—See ASSESSMENT AND TAXES.

Surrogate.]—See REVENUE.

See COUNTY COURTS.

COVENANT.

Restraint of Trade—Breach—Assignment of Interest Pendente Lite—Right to Continue Action.]—Upon the plaintiffs becoming the holders of shares in an incorporated trading company, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business and given a right to repurchase the shares, and by which he covenanted, among other things, that, if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations," in the same municipality. The agreement was terminated about six months later, and

about a year after its termination the defendant's son began to carry on a similar business in the same municipality. The defendant, without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced him to customers of the company, and solicited orders for him from them :—

Held, that, in order to establish a breach of the covenant, a legal contract of some sort between the defendant and his son must be shewn, and, failing such a contract, it could not be said that the defendant was "connected in any way" with his son's business within the meaning of the covenant.

Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial :—

Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant.

Semble, that the benefit of the covenant would be assignable along with the shares.

Judgment of the County Court of York reversed. *Roper et al. v. Hopkins*, 580.

For Quiet Enjoyment.] — See LANDLORD AND TENANT, 1.

For Renewal—Compensation for Improvements.] — See LANDLORD AND TENANT, 4.

See DIVISION COURTS, 4, 5.

CRIMINAL CODE.

Secs. 185, 800.] — See CRIMINAL LAW, 8.

Sec. 210.] — See CRIMINAL LAW, 4.

Secs. 344, 783, 785, 787.] — See CRIMINAL LAW, 1.

Sec. 404.] — See CRIMINAL LAW, 6.

Sec. 448.] — See CRIMINAL LAW, 7.

Sec. 841.] — See CRIMINAL LAW, 5.

Secs. 897, 898.] — See COSTS.

CRIMINAL LAW.

1. *Larceny from Person—Sentence—Police Magistrate—Jurisdiction—Consent—Criminal Code, secs. 344, 783, 785, 787.*] — The prisoner consented to be tried, and was tried and convicted, by the police magistrate for a city, for stealing a purse containing \$3.48 from the person, and was sentenced to three years' imprisonment :—

Held, upon the return of a *habeas corpus*, that the offence was an indictable one under sec. 344 of the Criminal Code, whether or not it fell also under the provisions of secs. 783 and 787, and was punishable by imprisonment for any period up to fourteen years, and the magistrate had jurisdiction by virtue of sec. 785. *Regina v. Conlin*, 28.

2. *Murder—Poisoning—Design—Evidence—Admissibility—Death of Former Husband of Prisoner.*] — Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his last illness, it was proved that his death was due to arsenical poisoning.

In order to shew that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning:—

Held, that the evidence was admissible. *Regina v. Sternaman*, 33.

3. *Evidence—Criminating Questions—Privilege—Canada Evidence Act, 1893—Res Gestæ—Evidence of Rejected Applications for Insurance—Coroner's Court—Court of Appeal in Criminal Cases—Res Judicata—56 Vict. ch. 31 (D.).*—Section 5 of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.), which abolishes the privilege of not answering crimi-nating questions, and provides that no evidence so given shall be receivable in evidence in subsequent criminal proceedings against the witness, other than for perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege.

MEREDITH, J., dissenting.

Regina v. Williams (1897), 28 O. R. 583, not followed.

On a charge of wife murder, the Crown sought to prove that the prisoner had been with evil design accumulating insurance on his wife's life:—

Held, that evidence of various applications for insurance, though in some cases resulting in rejection of the risk, was admissible, all being made practically at the same time and forming part of one transaction which could be properly given in evidence as a whole.

The Coroner's Court is a criminal Court.

As the Court of Appeal for criminal cases is now constituted the decision of the Judges of one Court is not binding on Judges sitting as another Court of co-ordinate jurisdiction. *The Queen v. Hammond*, 211.

4. *Criminal Code, sec. 210—Neglect to Support Wife—Former Marriage—Proof of Death of First Husband.*—The defendant, on the complaint of his wife, was convicted under sub-sec. 2 of sec 210 of the Code, of refusing to provide necessities for her.

The evidence shewed the parties were married in 1890, but that the complainant had been married to another person in 1886, though she had never lived with him; that in 1888 she had received a letter stating he was dying in the United States, and that that was the last she heard of him, save that about a year after her marriage to the defendant she again heard that he was dead.

No further proof of the death of the first husband was given:—

Held, that there was evidence to go to the jury of the death of the first husband, and that the defendant was properly convicted. *Regina v. Holmes*, 362.

5. *Indictment for Rape—Conviction for Common Assault—Time Within Complaint Laid—Code, sec. 841.*—A prisoner indicted for rape may be found guilty of common assault, notwithstanding the complaint or information is not laid within six months under sec. 841 of the Criminal Code. *Regina v. Edwards*, 451.

6. *Demanding Property with Menaces*—*Criminal Code, 1892, sec. 404—Intent to Steal—Evidence.*—By sec. 404, Criminal Code, 1892, "Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it."

The defendant was convicted by a magistrate of an offence against this enactment.

The evidence was that the defendant went, as agent for others, to the complainant's abode to collect a debt from him; that the defendant threatened the complainant that if the latter did not pay the debt, he would have him arrested; that the defendant demanded certain goods, part of which had been sold to the complainant by the defendant's principals, and on account of which the debt accrued, but upon which they had no lien or charge; and the complainant, as he swore, being frightened by the threats and conduct of the defendant, acquiesced in the demand for the goods, part of which the defendant took away and delivered to his principals, who themselves took the remainder. The defendant swore that he demanded and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this:—

Held, MEREDITH, C.J., dissenting, that there was no evidence of intent to steal.

Conviction quashed. *Regina v. Lyon*, 497.

7. *Code, Section 448—Prosecution for False Trade Description—Procedure.*—A prosecution under section 448 of the Criminal Code for

selling goods to which a false trade description is applied must be by indictment.

Prohibition granted to restrain summary proceedings before a magistrate. *Regina v. The T. Eaton Co., Limited*, 591.

8. *Procuring Female for Prostitution—Commitment—Recital of Invalid Conviction—Duplicity—Criminal Code, secs. 185, 800—Habeas Corpus—Court of Record—R. S. O. ch. 83, sec. 1.*—A commitment of the defendant to gaol recited a conviction for "unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere:—"

Held, that the commitment was bad on its face, as it recited a conviction which was invalid for duplicity and uncertainty.

The commitment, although it alleged a conviction, could not be supported under sec. 800 of the Criminal Code, because there was not a good and valid conviction to sustain it; the conviction returned being that the prisoner, at H., etc., did unlawfully procure a girl of seventeen years, I. D., to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the prisoner at L., in the State of New York, one of the United States of America; which did not come within any of the provisions of sec. 185 of the Code.

The words "a Court of Record" in the exception in sec. 1 of the *Habeas Corpus Act*, R. S. O. ch. 83, include only Superior Courts of Record, and do not include a magistrate's Court exercising the power conferred by sec. 785 of the Criminal Code. *Regina v. Gibson*, 660.

Death of Prosecutor—Effect of.]—
See CONVICTION.

Stifling Prosecution.]—See CONTRACT.

CROWN LANDS.

Free Grant and Homestead Act—Sale of Trees by Locatee—Validity of—Subsequent Issue of Patent to Vendor—Estoppel.]—A locatee of free grant lands under 38 Vict. ch. 8 (O.), (R. S. O. (1877) ch. 24), who has, contrary to the provisions of section 10 of the Act, sold the pine trees on the land before the issue of the patent, is not, nor is anyone claiming under him, after its issue, estopped from denying the validity of the sale. *Chapiewski v. Campbell et al.*, 343.

CURRENT EXPENDITURE.

See MUNICIPAL CORPORATIONS, 2

DAMAGES.

Excessive.]—See STREET RAILWAYS, 2.

Measure of.]—See BILLS SALE AND CHATTEL MORTGAGES, 1.

See LANDLORD AND TENANT, 1—MUNICIPAL CORPORATIONS, 8—RAILWAYS, 1.

DEATH.

Of Prosecutor.]—See CONVICTION.

Prior by Poisoning—Evidence of—Admissibility of.]—See CRIMINAL LAW, 2, 4.

See INSURANCE, 5.

DEBENTURES.

Issue of—To Repay Money Lent.]—
See MUNICIPAL CORPORATIONS.

DEBTS.

See ATTACHMENT OF DEBTS.

DEFAMATION.

Libel—Public Official—Newspaper—Comments in, on Conduct of—Belief in Truth of Statements Published—Erroneous Charge—New Trial.]—The discussion of the conduct of a solicitor of a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticise or make fair comments thereon; but the statements on which the criticism or comments are based must be true and not merely believed to be true on reasonable grounds.

Where, therefore, in an action for libel for statements published in a newspaper on which comments were made criticising the plaintiff's conduct as such solicitor, the jury, although they were told by the trial Judge in his charge that any criticism on the plaintiff's conduct must be based on the truth, were at the same time told that it was sufficient if the statements, on which the criticism was founded, were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial directed, *MACMAHON, J.*, dissenting upon the ground that there was evidence of the truth of the matters commented on, and that the charge, which was not objected to, must be taken in its entirety. *Douglas v. Stephenson*, 616.

Privilege.]—See TRADE UNIONS.

DELAY.

In Sale of Goods Distrained.—See DISTRESS, 2.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

1. 58 Vict. ch. 21 (O.)—R. S. O. ch. 127, sec. 12—Construction of—*Widow's Charge*—Quantum of—*Foreign Estate.*—Under 58 Vict. ch. 21 (O.), now sec. 12 of R. S. O. ch. 127, the widow of an intestate who has left no issue is entitled to \$1,000 out of his real estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country. *Sinclair v. Brown et al.*, 370.

2. *Widow's Election*—*Election after Lapse of a Year*—Administration by the Court—R. S. O. ch. 127, sec. 4.—When on administration by the Court of the estate of an intestate lands have been sold, the widow, although declared entitled to dower by the judgment, may, though more than a year has elapsed from the death of her husband, elect to take her distributive share in lieu of dower, provided the estate be not yet distributed on the footing of her having retained her dower right. *Baker v. Stuart* (No. 2), 388.

See ADVANCEMENT—WILL, 2, 5.

DIRECTOR.

Contract by.—See COMPANY, 2.

DISCRETION.

Of Trustees.—See TRUSTS AND TRUSTEES, 2.

DISTRESS.

1. *Mortgagor and Mortgagee*—*Decease of Mortgagor*—*Seizure of Stranger's Goods on Mortgaged Land*—*Authority of Bailiff*—*Principal and Agent*—*Interference of Agent in Distress*—*Evidence*—*Admissibility*—*Solicitor's Letter before Action.*—Mortgagees, by their warrant, authorized their bailiff to distrain the goods of the mortgagor upon the mortgaged premises for arrears due under the mortgage. The mortgagor being dead, the bailiff seized the goods of a stranger upon the premises:—

Held, that he was acting within the scope of his authority, as agent for a principal, in making the seizure upon the premises, and the mortgagees were liable for his act.

Lewis v. Read (1845), 13 M. & W. 834, and *Haseler v. Lemoyne* (1858), 5 C. B. N. S. 530, followed.

Held, also, that there was evidence upon which the jury might properly find that a local appraiser of the mortgagees was their agent for the purpose and interfered in and directed the seizure, after being informed that the goods were not those of the deceased mortgagor.

Semble, that a letter written before action by the solicitor of the defendants to the solicitor for the plaintiff was improperly received in evidence.

Wagstaff v. Wilson (1832), 4 B. & Ad. 339, referred to. *McBride v. Hamilton Provident and Loan Society et al.*, 161.

2. *Rent—Delay in Sale—Distress Left on Demised Premises—Bond by Tenant—Abandonment—Goods in Custodiâ Legis.*—Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties.

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary.

Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee.

McIntyre v. Stata (1854), 4 C. P. 248; *Roe v. Roper* (1873), 23 C. P. 76, and *Whimsell v. Giffard* (1883), 3 O. R. 1, distinguished.

Langtry v. Clark (1896), 27 O. R. 280, distinguished and not followed. *Anderson et al. v. Henry et al.*, 719.

See LANDLORD AND TENANT, 3.

DIVISION COURTS.

1. *Garnishee—Judgment Summons—Committal—Examination—Affidavit—R. S. O. ch. 51, sec. 235—57 Vict. ch. 23, sec. 18—Prohibition.*—The County Court Judge, presiding in a Division Court, has no power to commit a garnishee for default in making payments pursu-

ant to an order after judgment; and sec. 18 of 57 Vict. ch. 23 (O.) has not extended his powers in that behalf.

Before a garnishee can be examined under secs. 235 to 248 of R. S. O., 1887, ch. 51, as now permitted by sec. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by sec. 235.

Prohibition against enforcement of committal order. *Re Douler et al. v. Duffy: Inglesby, Garnishee*, 40.

2. *Prohibition—Amount in Dispute—Unsettled Account—Apparent Want of Jurisdiction—Interest—Part Prohibition.*—The summons in a Division Court plaint stated the plaintiffs' claim to be \$109.73, the amount of an account with interest. The account, as shewn by the particulars annexed, was a debit and credit one, consisting on the debit side of a number of items, aggregating \$456.50, and on the credit side of items of cash payments, amounting to \$361.50, leaving a balance of \$95, which, with \$14.73 claimed for interest, made the \$109.73. Judgment for the plaintiffs was signed for that amount for default of a dispute note:—

Held, that it did not appear on the face of the proceedings that the account was an unsettled one; for all that appeared, the account, though exceeding \$400, might have been a settled account, and the balance of \$95 an admitted balance; and therefore the jurisdiction of the Division Court was not excluded by sec. 77 of the Division Courts Act, R. S. O., 1887, ch. 51.

But the amount claimed was beyond the jurisdiction of the Division Court, as defined by sec. 70, sub-sec. (1), clause (b).

As, however, the claim for interest was severable, the prohibition should be limited to the excess over \$100.

Trimble v. Miller (1892), 22 O. R. 500, followed. *Re Lott et al. v. Cameron*, 70.

3. *Jurisdiction—Insolvent—Transfer of Goods in Trust—Distribution amongst Creditors—Action by Assignee to Recover Creditors' Share.*—

Within sixty days of the making of an assignment for the benefit of creditors, the insolvent transferred to a person in trust for certain of his creditors a quantity of butter, which was sold, realizing \$1,800, and the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee then sued one of the creditors to recover back the moneys paid him as his share, the amount so sought to be recovered being within the jurisdiction of the Division Court:—

Held, that the transfer was divisible into as many parts as there were shares and the Division Court had jurisdiction to entertain the action. *Beattie v. Holmes*, 264.

4. *Tort—Payment into Court—Continuance of Action—Right to Money in Court—Prohibition.*—In a Division Court action for a tort, money paid into Court by a defendant in alleged satisfaction of the plaintiff's claim, at once becomes the plaintiff's, but if he proceeds with the action it must, under Rule 170, remain in Court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom.

Where, therefore, after payment into Court by a defendant of a sum

of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favour, an order made by the Division Court Judge directing the sum so paid in to be paid out to the defendant, was set aside, and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant. *O'Neil v. Hobbs*, 487.

5. *Jurisdiction—Splitting Cause of Action—Mortgage—Instalments of Interest—Assignee of Covenant—Indemnity.*—A mortgagee cannot sue in the Division Court for the amount of an instalment of interest within the jurisdiction of that Court when other instalments of interest are due which bring the whole amount beyond the jurisdiction.

Sub-section 2 of sec. 79 R. S. O. ch. 60, permitting separate actions for principal and interest on a mortgage, applies only to an action brought upon the mortgage by a person to whom the money is payable thereon, and does not apply to an action brought by the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it.

Judgment of *ROBERTSON, J.*, reversed. *Re The Real Estate Loan Company v. Guardhouse, Newlove, Garnishee*, 602.

See ATTACHMENT OF DEBTS.

DOCUMENT.

Construction of.—See HUSBAND AND WIFE.

DOMICIL-

See REVENUE.

DOMINION PARLIAMENT.

See RAILWAYS, 2.

DOWER.

Mortgaged Lands — Purchase of Equity of Redemption — Discharge of Existing Mortgage — New Mortgage — Registration — Equitable Dower — 42 Vict. ch. 22 (O.) — Legal Estate — Momentary Seizin.] — Although, since the passing of the Act 42 Vict. ch. 22 (O.), an Act to amend the law of dower, a married woman is entitled to dower out of an equity of redemption in land, whether her husband dies seized of it or not, where such equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower, she is not entitled to dower out of an equity of redemption purchased and sold by him in his lifetime, the legal estate never having vested in him.

Martindale v. Clarkson (1880), 6 A. R. 1, distinguished.

And where a purchaser of land subject to a mortgage paid off and procured a discharge in favour of the mortgagor, and on the same day obtained his conveyance from him, giving back a mortgage, with bar of dower, for the balance of the purchase money, all of which instruments were registered in the above order, it was *held*, ROBERTSON, J., dissenting, that the wife of such purchaser was not entitled to dower out of a surplus arising on a sale

under a subsequent incumbrance, her husband never having been even momentarily seized of the legal estate in the land. *Re Luckhardt*, 111.

DUTY.

Legacy.]—See WILL, 3.

Succession.]—See REVENUE.

EASEMENT.

See WAY, 1.

EJECTMENT.

Landlord and Tenant — Parties — Judgment — Sub-tenants.]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given against the tenant under which the sub-tenants must go out.

Judgment of ARMOUR, C. J., reversed. *Incorporated Synod of Toronto v. Fiske*, 738.

ELECTION.

By Widow in Lieu of Dower.]—See DEVOLUTION OF ESTATES ACT, 2.

See LANDLORD AND TENANT, 4.

ELECTIONS.

See MUNICIPAL CORPORATIONS, 7.

ENTRY.

Lease — Estoppel.] — See LIMITATION OF ACTIONS, 1.

See LIMITATION OF ACTION, 2.

ESTATE.

Conveyance in Trust for — Temperance Society.] — See TRUSTS AND TRUSTEES.

See DEVOLUTION OF ESTATES ACT.

ESTATE TAIL.

See WILL, 4.

ESTOPPEL.

Acceptance of Lease.] — See LIMITATION OF ACTION, 1.

Agreement to Bequeath Estate — Specific Performance.] — See CONTRACT, 2.

See CROWN LANDS.

EVIDENCE.

Admissibility.] — See CRIMINAL LAW, 2 — DISTRESS — INSURANCE, 4 — WAY, 3.

Intent to Steal.] — See CRIMINAL LAW, 6.

Of Lease.] — See LIMITATION OF ACTION, 1.

Renunciation of Administration.] — See HUSBAND AND WIFE.

See CRIMINAL LAW, 2, 3, 4, 5 — INTOXICATING LIQUORS, 2 — PARENT AND CHILD, 1 — SOLICITORS.

EXAMINATION.

Of Garnishee.] — See DIVISION COURTS, 1.

EXCHEQUER COURT.

See SOLICITOR.

EXECUTION.

Fi. Fa. Lands — Limitation of Actions — Renewal of Fi. Fa. — “Lien” — “Proceeding” — “Money Charged upon Land” — R. S. O. ch. 111, sec. 23.] — The right of an execution creditor under a *fi. fa.* lands in the hands of the sheriff of the county in which the lands of the debtor are situate is a “lien,” and the money mentioned in the writ is “money charged upon land.” Taking steps to sell under such a writ is a “proceeding,” and although duly renewed if the writ has been more than ten years in the sheriff’s hands, and no payment or acknowledgment has in the meantime been made or given as required by section 23 of R. S. O. ch. 111, the lien is gone, and proceedings on the writ will be restrained. *Neil v. Almond et al.*, 63.

Jurisdiction of Magistrate.] — See CONSTABLE.

EXECUTION CREDITOR.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

EXECUTORS AND ADMINISTRATORS.

See WILL, 2, 5.

FINE.

Non-payment of—Expulsion of Member.—See TRADE UNIONS.

FIRE INSURANCE.

See INSURANCE, 3, 4, 6.

FIXTURES.

1. *Wooden Building—Removability—Mode of Use—Constructive Attachment to Soil—Mortgagor and Mortgagee.*—In an action upon a mortgage, the plaintiff claimed, as part of the freehold, a certain erection placed upon the mortgaged premises by the husband of the owner of the equity. The building was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil. It was first used as a shop, then turned into a dwelling-house, and this was rented for a while by the husband and wife. The building could easily be moved with little or no injury to the soil:—

Held, that it was not in fact affixed or annexed to the soil, but was merely a chattel which might be moved at any time. The onus was on the plaintiff to shew that it could not or ought not to be removed as against him, but the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the

conclusion that it was to be deemed constructively attached to the freehold. *Miles v. Ankatell et ux.*, 21.

2. *Fixtures—Negotiations for Sale—Intention to Sever—Subsequent Purchaser of Freehold—Rights of.*—The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another, even if communicated to one who becomes a subsequent purchaser of the freehold, will not operate to convert the fixture into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser.

Judgment of MEREDITH, J., reversed. *Minhinnick v. Jolly*, 238.

3. *Chattels—Mortgage of Realty—Conversion by Express Agreement—Subsequent Chattel Mortgage—Notice—Priority.*—Chattels of the nature of plant or machinery not structurally affixed to the freehold, as well as those of a like nature afterwards placed on the mortgaged premises, may, by the express terms of a mortgage of the realty, become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance. *The Canada Permanent Loan and Savings Company v. The Traders Bank*, 479.

FOREIGN ESTATE.

See DEVOLUTION OF ESTATES ACT, 1.

FORFEITURE.

See SALE OF LAND.

FREE GRANTS.*See CROWN LANDS.***GARNISHMENT.***See ATTACHMENT OF DEBTS—DIVISION COURTS, 1.***GIFT.***To Charities — Validity.] — See WILL, 3.***HABEAS CORPUS.***See CRIMINAL LAW, 8—INFANTS.***HARBOUR.***Right to Cut Passage through for Ice.] — See WATER AND WATERCOURSES, 2.***HIGHWAY.***See MUNICIPAL CORPORATIONS, 1, 3, 4, 5, 6, 8—WAY.***HOMESTEAD ACT.***See CROWN LANDS.***HUSBAND AND WIFE.***Separate Estate of Wife — Husband's Interest in—Renunciation—Rights of Administrator of Wife's Estate—Evidence of Renunciation—Construction of Document.]—A husband is beneficially entitled to a share in the personal property of his wife,*

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on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R. S. O. ch. 127, sec. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself.

And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest.

The administrator of the wife's estate has a status to set up the husband's renunciation in answer to a claim made by him to a share in the estate.

The husband, before marriage, signed a writing as follows: "This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects:—"

Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage, and was sufficient to protect her estate from any claim of his, after the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896. *Dorsey et al. v. Dorsey*, 475.

Neglect to Support Wife.]—See CRIMINAL LAW, 5.

ICE.

Carriage of—Right of Passage through Harbour.]—See WATER AND WATERCOURSES, 2.

ILLEGALITY.

See CONTRACT, 1.

IMPROVEMENTS.

See LANDLORD AND TENANT, 4—
PARENT AND CHILD, 1.

INDEMNITY.

See BOND—MUNICIPAL CORPORATIONS, 8—WILL, 1.

INFANTS.

Custody—Paternal Right—Maternal Right—Separation of Family.—The provision of R. S. O. ch. 168, sec. 1, with regard to the custody of infants, recognizes the maternal as well as the paternal right, and requires equal regard to be paid to the wishes of the mother as to those of the father; and thus, where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare of the children.

And where the father was guilty of adultery with a servant in his house, and of making unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and at times cruel to her and them:—

Held, upon *habeas corpus* proceedings taken by the father and a petition for custody by the mother, that it was for the welfare at least of the children under five years that they should remain in their mother's custody, and, as it would be wrong to divide the custody, all the children,

the eldest being fifteen, should remain in the custody of the mother.

The difference between the law of England and that of this Province specially referred to. *Re Young*, 665.

See LIMITATION OF ACTIONS—NEG-
LIGENCE—PARENT AND CHILD.

INJUNCTION.

See MUNICIPAL CORPORATIONS, 7.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Life Insurance—Benefit Certificate—"Ordinary Beneficiary"—Re-apportionment by Will—Validity—60 Vict. ch. 36, secs. 151, 159, 160 (O.)—Retroactivity—Appeal—Waiver.*—A life insurance certificate on its face made the sum of \$500 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred, before the passing of 60 Vict. ch. 36 (O.):—

Held, that secs. 151, 159 and 160 of that Act applied to the certificate and declaration made by the will, and by those sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary" and the reappportionment made by the will was valid.

Right of appeal waived by acting on judgment. *Videan et al. v. Westover*, 1.

2. *Action—Time—Ontario Insurance Act, 60 Vict. ch. 36, sec. 148 (2)—Enabling Statute.*—The words of sec. 148 (2) of the Ontario Insurance Act, 60 Vict. ch. 36, "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation of agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment. *Styles et al. v. Supreme Council of the Arcanum*, 38.

3. *Fire Insurance—Mortgage—Cancellation of Mortgagor's Insurance—Double Insurance—Proofs of Loss—R. S. O. ch. 203, sec. 168, sub-sec. 8; sec. 169, sub-sec. 19.* The plaintiff insured his barn in the defendant company for \$2,100, and afterwards mortgaged his farm, including the barn, to a loan company for \$1,500, assigning the policy to the company as collateral security. The mortgage purporting to be under the Short Form Act contained a covenant that the mortgagor would insure the buildings, unless already insured, for not less than \$1,000, provided that the mortgagees might themselves effect such insurance without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of \$600. The property having been destroyed by fire the plaintiff notified the company, when they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards offering to supply proofs of

loss, if required, the company again denied any liability on the ground of cancellation, saying nothing as to furnishing proofs of loss:—

Held, that the plaintiff did not cease to be the person assured within the meaning of the Insurance Act, R. S. O. ch. 203, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act in that behalf:—

Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of sub-sec. 8, sec. 168, of R. S. O. ch. 203; nor could it be deemed a "double insurance":—

Held, also, there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss. *Morrow v. The Lancashire Ins. Co.*, 377.

4. *Fire—Vendor and Purchaser—Fire after Contract of Sale—Right of Insured to Recover—Parol Contract—Admissibility of Evidence.*—House property was sold by written contract for \$2,000, the parties to the contract at the same time verbally agreeing that until payment of the purchase money the vendor would insure the property for that sum, which he did with the defendants by policy insuring himself, his heirs and assigns, against damage by fire not exceeding the above amount nor his interests in the property, without saying anything about the sale. A fire occurred with a total loss of \$1,740, before which, however, the purchaser had paid \$1,300 of the purchase money:—

Held, that evidence of the parol contract was admissible.

Parcell v. Grosser (1885), 1 Atl. R. 909, followed.

Held, also, that "heirs and assigns" in the policy meant heirs and assigns of the property, and the purchaser was an assign; and the vendor could recover the amount of his own loss, \$700, and also the residue of the loss as trustee for the purchaser. *Keefer v. The Phoenix Ins. Co. of Hartford*, 394.

5. *Life Insurance — Death of Children*—*R. S. O. 1887 ch. 136—Re-apportionment — Will — Grandchildren—Cancellation and Re-issue of Policies — 60 Vict. ch. 36 (O.)—Creditors.*]—A person insured his life for the benefit equally of six of his children, three of whom died without issue in his lifetime. By his will he altered the shares of the three survivors, giving a portion to another child and portions to four grandchildren and caused the policies to be cancelled and re-issued payable to "his executors in trust," and died in 1894 while *R. S. O. (1887) ch. 136* was in force :—

Held, that the apportionments to the four children were valid, but those to the grandchildren, while valid as legacies, were invalid as against creditors.

Held, also, that the provision in 60 Vict. ch. 36, sec. 159 (O.), permitting an apportionment in favour of grandchildren "to any contract of insurance heretofore issued and declaration heretofore made," did not apply to a policy which had become a claim by the death of the insured, but was limited to policies current at the time of the passing of the said Act.

Held, also, that the issue of the new policies did not affect the rights of the parties as the executors would take in trust for those who were beneficially entitled.

Videan v. Westover (1897), 29 O.

R. 1, distinguished. *McIntyre v. Silcox et al.*, 593.

6. *Fire Insurance — Variation from Statutory Conditions—"Co-insurance" Clause—"Not Just and Reasonable"*—*R. S. O. ch. 203, sec. 171.*]—The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for \$15,000, "subject to seventy-five per cent. co-insurance" — these words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink, among the variations of the statutory conditions, as follows :—"The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of \$42,120.17, the cash value of the property insured being \$115,000, and the whole amount of insurance upon it, including the \$15,000 named in the defendants' policy, \$70,000. The defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than the latter, but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy :—

Held, following *Wanless v. Lan-*

cashire Insurance Co. (1896), 23 A. R. 224, that the "co-insurance" clause was a condition and a variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of sec. 171 of the Ontario Insurance Act, R. S. O. ch. 203, it was binding on the insured. *Eckhardt et al. v. Lancashire Ins. Co.*, 695.

7. *Life Insurance—Friendly Society—Liquidation—Master's Report—Practice—Notice of Filing—Appeal—Total Disability Benefit—Repeal of Provisions as to—Assessments—Non-payment—Suspension—"Fixed Dates"—Time—Notice.*—The provision of Con. Rule 769 that notice of filing a Master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute.

Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R.S.O. ch. 203, notice of filing the report given in the *Ontario Gazette* and other newspapers, pursuant to sec. 193 of that Act, is not tantamount to personal service.

Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and repealed by the society during the membership of the insured:—

Held, that he was bound by such action.

Baker v. Forest City Lodge (1897), 28 O.R. 238, 24 A.R. 585, followed.

By sec. 165 of R. S. O. ch. 203 it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract

with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given, as mentioned in sub-sec. (2), and default thereafter for not less than thirty days: the meaning of which is that in the case of assessments which by implication are of fixed amount, and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure.

By the constitution and rules of the society, the amount and frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble, according to the needs of the society:—

Held, that the assessments could not be regarded as "payable at fixed dates;" and as, in the case of the member whose standing was in question, the notices to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred.

Hartley v. Allen (1858), 4 Jur. N. S. 500, 31 L. T. N. S. 69, 6 W. R.

407, not followed. *Re Supreme Legion Select Knights of Canada. Cunningham's Case*, 708.

See CRIMINAL LAW, 3.

INTEREST.

Amount Severable from Claim.]—
See DIVISION COURTS, 2.

When Allowable.]—See MUNICIPAL CORPORATIONS, 11—WATER AND WATERWORKS, 3.

INTOXICATING LIQUORS.

1. *Liquor License Act—Treating on Sunday*—"Other Disposal"—*R. S. O. ch. 194, sec. 54.*]—Treating or giving liquor to friends by a landlord in a private room in his licensed premises on a Sunday is an offence under sec. 54 of *R. S. O. ch. 194*, and is covered by the words "other disposal" in that section. *Regina v. Walsh*, 36.

2. *Liquor License Act—Conviction for Selling without License—Steward of Club—Certiorari—Evidence*—*R. S. O. ch. 194, sec. 50.*]—The steward of a club, incorporated under *R. S. O. (1887)*, ch. 157, though having no license, supplied, at his own discretion, intoxicating liquors to members and others in exchange for tickets purchasable by members from the club secretary, in a part of the building of which the club were lessees. The liquors originally purchased belonged to the club, which, by its charter was expressly forbidden to traffic in, sell or dispose of such liquors, or allow others to do so, in the club building:—

Held, that the steward was rightly convicted of keeping or having liquors for sale without license under *R. S. O. (1887)*, ch. 194, sec. 50.

Graff v. Evans (1881), 8 Q. B. D. 373, distinguished.

Semble.—Though a conviction be good on its face, yet where there is no appeal to the General Sessions the Court will not refuse to go into the evidence on motion to quash. *Regina v. Hughes*, 179.

Temperance.]—See TRUSTS AND TRUSTEES, 1.

JUDGMENT.

For Possession.]—See EJECTMENT.

JURISDICTION.

Negligence in Another Province—Railways—Cause of Action—Service of Writ.]—A writ of summons in an action to recover damages against a railway company for negligence alleged to have occurred in British Columbia, was issued out of the High Court of Justice for Ontario, and was served on the defendants' claims agent in Toronto, Ontario. The head office of the railway, incorporated by Dominion legislation, was in the Province of Quebec, but the company carried on business in Ontario through which its railway ran, and where large numbers of its officers and servants resided:—

Held, that the action was properly brought in Ontario, and the service of the writ therein was valid. *Tyler v. The Canadian Pacific R. W. Co.*, 654.

Of County Courts.]—See COUNTY COURTS—MUNICIPAL CORPORATIONS, 7.

Of Division Courts.]—See DIVISION COURTS, 2, 3, 5.

Of Ontario Courts.]—See ACTION.

Of Police Magistrate.]—See CRIMINAL LAW, 1.

Of Provincial Court.]—See SOLICITOR.

Of Railway Committee.]—See RAILWAYS, 2.

Of Weekly Court.]—See COSTS.

See CONSTABLE—COSTS—REVENUE.

LAND.

Injury to in Another Province.]—See ACTION.

See CROWN LANDS—EXECUTION.

LANDLORD AND TENANT.

1. *Termination of Tenancy — Agreement—"Disposing" of Premises — Notice to Quit—False Representations—Covenant for Quiet Enjoyment—Disturbance — Breach — Acquiescence—Damages.*]—A lease of part of a building contained a proviso that, in the event of the lessor disposing of the building, the lessees should go out on notice; and shortly after the lease was made he notified them to vacate, as he had disposed of his interest in the building; which they did, under protest.

The alleged disposal was by an agreement in writing between the lessor and another, whereby the latter was to have superintendence of the building, to obtain tenants at higher rents and to collect the rents;

the leases to be in the name of the former; the latter to have a sub-lease on the happening of certain events and an option to purchase at any time before its expiration:—

Held, not a disposal of the building within the meaning of the proviso; but, as the lessor had not intentionally, wilfully or maliciously misled the lessees, and was acting in good faith upon what he believed to be his rights, there was no actionable false representation.

Derry v. Peek (1889), 14 App. Cas. 337, followed.

But the lessees were entitled to damages for breach of the short form covenant, contained in the lease, for quiet enjoyment "without interruption or disturbance from the lessor;" the covenant being against the lessor's own acts, it was not material whether the act assigned as a breach was lawful or not; and the acts here done were in breach of the covenant, for there was no right to give the notice to quit, nor to complain that the lessees acted upon it without waiting for an action to be brought.

Edge v. Boileau (1885), 16 Q. B. D. 117, followed.

Cowling v. Dickson (1880), 45 U. C. R. 94, 5 A. R. 549, discussed.

An agreement made after the notice, under which the lessees went out before the day named, was not an acquiescence in the lessor's demand, for they complied under protest, and leaving earlier merely lessened the damages.

Assessment of damages as in a case of eviction. *Gold Medal Furniture Mfy. Co. v. Lumbers*, 75.

2. *Lease — Habendum — Repugnant Subsequent Clause.*]—A lease with habendum for a year contained a subsequent clause that either party might terminate the lease at the end

of the year on giving three months' written notice prior thereto :—

Held, that the clause was repugnant to the habendum and must be rejected, and that the lease terminated at the end of the year without any notice. *Weller et al. v. Carnew*, 400.

3. *Assignment for Benefit of Creditors—Future Rent—Preferential Lien—Distress—R. S. O. ch. 170, sec. 34.*—By the terms of a lease of shop premises, the rent was payable quarterly in advance. There was also a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors :—

Held, that the expression "arrears of rent due * * for three months following the execution of such assignment" in sec. 34 of the Landlord and Tenants' Act, R. S. O. ch. 170, means "arrears of rent becoming due during the three months following the execution of such assignment ;" and the landlord was, therefore, apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment :—

Held, also, that the expression "the preferential lien of the landlord for rent" in sec. 34 has the same meaning that it had under the Insolvent Acts ; and the landlord was entitled to be paid the amount found due to him, as a preferred

creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress. *Lazier v. Henderson*, 673.

4. *Covenant for Renewal—Compensation for Improvements—Time for Election.*—Where a covenant in a lease to the effect that if, on the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew at a rental to be fixed as therein directed, went on to provide that if the lessors did not see fit to renew the lessee should receive compensation for his permanent improvements :—

Held, that in order to entitle the lessee to claim compensation for his improvements and refuse to accept a renewal lease, the lessors must have elected before the expiration of the existing term not to renew ; and if they did not so elect the lessee was bound to accept a renewal lease if and when required so to do. *Ward v. The Corporation of the City of Toronto*, 729.

See BANKRUPTCY AND INSOLVENCY, 2 — COUNTY COURTS — DISTRESS — EJECTMENT — LIMITATION OF ACTIONS, 1, 2.

LARCENY.

See CRIMINAL LAW, 1, 6.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

Charge.—See WILL, 1.

Duty on.—See WILL, 3.

LIBEL.

Privilege.—See TRADE UNIONS—
DEFAMATION.

LIEN.

Trainer of Animal—Continuing Possession—Discontinuance of Possession—Resumption.—A continuing right of possession of the animal must accompany the services rendered by a trainer for which he claims a lien on a horse which he has trained in order to render such lien valid.

A trainer who had delivered up possession of a horse which he had been training, to the administratrix of the owner from whom he had received it, and who afterwards resumed possession under a new agreement with the administratrix to take care of the horse, was held to have lost any lien he might have had. *Reilly v. McMurray*, 167.

See EXECUTION.

LIFE INSURANCE.

See INSURANCE, 1, 2, 5, 7.

LIMITATION OF ACTIONS.

1. Infant Heir-at-Law—Entry—Evidence of Lease—Estoppel—Adverse Title—Overholding Lessees—Tenants in Common.—In an action of ejectment, it appeared that the

father of the defendant died intestate in 1849, the owner of the fee and in possession of the lands in question. He had been twice married, but none of the children of his first marriage had been heard of since 1853. His widow continued in possession after his death with her children; she married again in 1852, and her husband lived with her upon the land until her death, intestate, in 1871. At this time her husband and the youngest daughter of her first marriage, the defendant, were the only members of the family upon the land. Soon after her death, her eldest son made a lease of the land to his stepfather and his sister, the defendant, for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which was executed by the lessees, the lessor was described as the eldest son and heir-at-law of his father, the original owner. This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption, until 1892, when the stepfather died intestate, leaving a son, one of the plaintiffs, surviving him, and since that time the defendant had been in possession, also without acknowledgment or interruption, until this action was brought in 1897, by the surviving brother and sister of the defendant and her half-brother.

The lessor had died in 1878; it was said that he left one son, who, when very young, in 1880, was taken by his aunt, one of the plaintiffs, to the house upon the land, where he stayed one night; and the aunt said that she told her sister, the defendant, that he was the heir to the property:—

Held, that, even if the boy were the true owner, this was not an entry upon the land, as owner, sufficient to stop the running of the statute.

2. The defendant and her stepfather, being in possession without any title, and accepting a lease from the eldest son of the second marriage, as the heir-at-law, were estopped from setting up the adverse title of the real heir-at-law, the eldest son of the first marriage, as against the lessor or persons claiming under him.

3. The plaintiffs' claim to possession under a conveyance from the alleged heir-at-law of the lessor could not be allowed, because there was no evidence that he was the heir-at-law, and because his title, if he had any, had been barred by the possession of the defendant and her stepfather since 1876, when the lease expired.

4. The title acquired by the defendant and her stepfather by length of possession was acquired by them as tenants in common, and not as joint tenants, and therefore, upon the death of the latter, his undivided half descended to his son.

Ward v. Ward (1871), L. R. 6 Ch. 789, distinguished. *Brock et al. v. Benness*, 468.

2. *Exclusive Possession of Land—Receipt of Profits—Pasture for Cattle.*]—While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant:—

Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did

not begin to run in his favour. *Rennie v. Frame*, 586.

See CONTRACT, 2—EXECUTION.

LIQUORS.

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Right to Sue for Support.]—See BOND.

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MALICIOUS ARREST AND PROSECUTION.

Malicious Prosecution—Reasonable and Probable Cause—Honest Belief of Prosecutor—Reasonable Care in Ascertaining Facts—Bona Fides—Malice.]—In an action for malicious prosecution brought against an insurance company by reason of an information charging the plaintiff with arson, and causing his arrest thereon, the jury found that the company's officers, who laid the charge, believed it to be true; but that such belief was not under the circumstances reasonable, and that they did not act on it in laying the charge and causing the arrest, but were actuated by other and improper motives:—

Held, per ROSE, J., that the jury having found that the defendants' officers honestly believed in the

truth of the charge laid, and the evidence warranting that finding, absence of reasonable and probable cause could not be held to have been shewn simply because further inquiries might have been made or further facts shewn: that the question of malice was of no importance, and that the defendants were entitled to judgment.

On appeal to the Divisional Court, *held*, affirming the judgment, that the burden was on the plaintiff to shew that the defendants acted without reasonable and probable cause; and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited. *Malcolm v. Perth Mutual Fire Ins. Co.*, 406. Affirmed on Appeal, 717.

See CONSTABLE.

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MUNICIPAL CORPORATIONS.

1. *Injury from Non-repair of Highway—Notice of Accident—Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1—57 Vict. ch. 50, sec. 13 (O.)—59 Vict. ch. 51, sec. 20 (O.).*—The provisions of sec. 531, sub-sec. 1, of the Consolidated Municipal Act, 1892, amended by 57 Vict. ch. 50, sec. 13, and re-amended by 59 Vict. ch. 51, sec. 20, as to the notice requisite to be given to municipal corporations in order to hold them liable for accidents arising from non-repair of highways, are applicable only to actions brought against such corporations singly, and not to actions brought against two or more jointly, as in this case, against a township and an incorporated village, where the plaintiff might fail against one corporation by reason of want of notice to it, and yet be entitled to recover against the other, it having had due notice. *Leizert v. The Corporation of the Township of Matilda*, 98.

2. *Borrowing Powers—Current Expenditure—Inquiry by Lender—56 Vict. ch. 35, sec. 10 (O.).*—*Repay-*

ment of Money Lent.—Undersec. 413 of the Municipal Act, 55 Vict. ch. 42 (O.), as amended by 56 Vict. ch. 35, sec. 10, a lender is bound to inquire into the amount of taxes authorized to be levied by a municipality to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing.

A municipal council may, however, with the consent of the rate-payers, raise money by debentures to repay money so unlawfully borrowed, when the expenditure, although not included in the estimates, was for purposes within the general powers of the corporation. *Fitzgerald et al. v. Molsons Bank et al.*, 105.

3. *Highway—Repair—Accident—Runaway Horses—Control.*]—The word "repair," as used in the Municipal Act with reference to a highway, is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

And where the driver of a vehicle lost control of his horses, which ran away and caused the injury for which the action was brought by their running the vehicle against a stump in the highway, it was held that the plaintiffs could not recover against the municipality, because, notwithstanding the stump, the road was in a reasonable state of repair for ordi-

nary travel. *Foley et al. v. Township of East Flamborough*, 139.

4. *Want of Repair—Hinge on Trap-door on Sidewalk—Accident—Negligence.*]—The existence of hinges on a trap-door a little more than an inch above the level of the sidewalk in a city, affixed by the owner of the abutting premises for convenience of access to his cellar, and against which the plaintiff, who was well aware of their existence, tripped and injured himself, does not constitute such a want of repair as to render the corporation liable for negligence. *Ewing v. The Corporation of the City of Toronto*, 197.

5. *Tiles Placed on Side of Highway—Accident—Negligence.*]—On the side of a township road where there was a fill of about fourteen feet, with railings on either side, a quantity of tiles, of a large size, and of a light grey colour, were, shortly before the accident, piled by defendants on the side of the highway in a slight hollow behind the railing, for the purpose of repairing the culvert which ran through the fill. Some planks were thrown over them, and a board nailed between the two boards forming the railing, so as to further hide the tiles from view:—

Held, that this did not constitute evidence of negligence on the defendants' part so as to render them liable for injuries sustained by the plaintiff by reason of the horse, which he was driving, becoming frightened at the tiles and running away. *Macdonald et al. v. The Corporation of the Township of Yarmouth*, 259.

6. *Carters Employed to Remove Street Sweepings—Master and Servant—Negligence—Liability.*]—The relationship of master and servant

exists between a city corporation and a licensed carter owning his own horse and cart, who, paid by the hour by the city, is hired by and is under the direction of their street foreman for the purpose of removing street sweepings; and the city may be liable for an injury caused by the negligence of the carter while so occupied in their employment. *Saunders v. The Corporation of the City of Toronto*, 273.

7. *Municipal Elections—Quo Warranto—Concurrent Motions in High and County Court—Prohibition—Injunction—Collusion—R. S. O. ch. 223, secs. 219, 227.*—By section 219 of the Municipal Act R. S. O. ch. 223, jurisdiction is given respectively to a Judge of the High Court, the senior or officiating Judge of the County Court, and the Master in Chambers to try the validity of a municipal election, and by section 227 when there are more motions than one all the motions shall be made returnable before the Judge who is to try the first of them.

Two motions by different relators to try the validity of the same election were made returnable, the first of them before the Master in Chambers and the other before the County Judge who, notwithstanding objections, proceeded with the motion before him and decided that the proceedings before the Master in Chambers were collusive, when the County Judge was prohibited from further proceeding by an order made by a Judge of the High Court sitting in Chambers:—

Held, that the County Court Judge having equal and concurrent jurisdiction in respect of the matter with the other named officials, a Judge of the High Court sitting in Chambers could not under the circumstances

prohibit him from proceeding with the trial. *STREET J.*, dissenting.

Semble, the County Court Judge who, without knowledge of the prior proceedings had granted a fiat for like proceedings, had jurisdiction on the return thereof to inquire whether such prior proceedings were collusive, and if so to disregard them. *In re Regina ex rel. Hall v. Gowanlock*, 435.

8. *Highway—Obstruction—Telephone Pole—Non-repair—Runaway Horses—Liability—Notice—Contributory Negligence—Indemnity—Telephone Company—Erection of Poles—Sanction of Corporation—Damages.*—A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole planted twelve feet from the centre line and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants:—

Held, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was not in good or reasonable repair; and the city corporation, having notice and knowledge of the obstruction, and also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained.

Sherwood v. City of Hamilton (1875), 37 U. C. R. 410, followed.

Foley v. Township of East Flamborough (1898), 29 O. R. 139, distinguished.

Driving a horse that had before run away, as one of a pair of horses, was not, of itself, negligence contributing to the disaster.

Held, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation and with their sanction, under an agreement entered into with them, and they could not recover indemnity from the telephone company by whom it was erected.

Quantum of plaintiffs' damages considered. *Atkinson et al. v. City of Chatham*, 518.

9. *By-law—Repeal—Public Schools Act*, R. S. O. ch. 292, secs. 38, 39—*Alteration of School Sections—Township Council—County Council—Appeal*.]—It is *ultra vires* a township council which has regularly passed a by-law under the provisions of sec. 38 of the Public Schools Act, creating a new rural school section from parts of existing school sections, to repeal or alter such by-law until the expiration of five years as provided in the Act, although the repealing by-law is passed before that creating the new section is to take effect.

The only remedy is an appeal to the county council against the by-law, under sec. 39 of the Act. *Re Powers and Township of Chatham*, 571.

10. *By-law—Registration—Plans—“Instrument”—Notice*.]—A municipal by-law, passed in 1888, providing for the opening of a road was received at the proper registry office and the fee for registry was

paid, but the by-law was never entered or registered, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 ch. 114, sec. 84, sub-sec. 2 :—

Held, that the by-law was an “instrument” within the meaning of that section, and as defined by sec. 2, but was not an “instrument capable of registration” within the meaning of sec. 96 of R. S. O. 1897 ch. 136, and the registrar was right in refusing to register it; and, never having been registered, it never became “effectual in law” for any purpose; and a subsequent by-law providing for the cost of opening the road was, therefore, invalid.

The requirement of the Municipal and Registry Acts (R. S. O. 1897 ch. 223, sec. 633, and ch. 136, sec. 86) that such a by-law shall be registered before it “becomes effectual in law,” is not merely for the purpose of notice under the registry laws. *Re Henderson and City of Toronto*, 669.

11. *Arbitration and Award—Lands Injurious Affected—Compensation—Interest*.]—Where compensation is allowed in an award for lands “injuriously affected” by the exercise of the powers of a municipal corporation under section 483 of 55 Vict. ch. 42 (O.) (R. S. O. ch. 223, sec. 437), the arbitrator, although no land is taken, may award interest on the amount from the date of the by-law authorizing the work. *FERGUSON, J.*, dissenting.

Decision of *STREET, J.*, reversed. *Re Leak and The City of Toronto*, 685.

See ASSESSMENT AND TAXES—WATER AND WATERCOURSES, 3, 4, 5.

MURDER.*See* CRIMINAL LAW, 2.**MUSIC.***See* NUISANCE.**NAME.***Similarity in.*—*See* ATTACHMENT OF DEBTS.**NAVIGATION.***See* WATER AND WATERCOURSES, 2.**NEGLIGENCE.**

Machine—Proximity to Highway—Infant of Tender Years—Allurement—Knowledge of Defendant—Trespasser—R. S. O. (1887) ch. 211.—Plaintiff, a child of five years of age, was injured by a horse-power used by the defendant to hoist grain into his warehouse. The machine was on a lot unfenced on one side, leased by him, adjoining his warehouse, about thirty feet from the highway, and was in charge of a man who was temporarily absent for a few minutes at the time of the accident. There was no evidence that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, nor was there any evidence of any knowledge in the defendant that children were in the habit of frequenting the place or of any intention on his part to injure:—

Held, that as the plaintiff had no

right to be where he received the injury he could not recover:—

Held, also, that the omission of the defendant to comply with the provisions of the Act requiring threshing and certain other machines to be guarded (R. S. O. 1887) ch. 211 did not give a cause of action to the plaintiff.*Finlay v. Miscampbell* (1890), 20 O. R. 29, followed. *Smith v. Hayes*, 283.*Action in Another Province.*—*See* JURISDICTION.*Excessive Damages.*—*See* STREET RAILWAYS.*See* MUNICIPAL CORPORATIONS, 1, 3, 4, 5, 6, 8.**NEW TRIAL.***See* DEFAMATION—STREET RAILWAYS, 2.**NOTICE.***Of Accident.*—*See* MUNICIPAL CORPORATIONS, 1, 8.*Of By-law.*—*See* MUNICIPAL CORPORATIONS, 10.*To Mortgagees—Waterworks Arbitration.*—*See* WATER AND WATERWORKS, 3.*Of Obstruction on Highway.*—*See* NEGLIGENCE.*See* FIXTURES, 3—INSURANCE, 7—SALE OF LAND.**NOTICE OF ACTION.***Insufficiency of.*—*See* CONSTABLE.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 1.

NUISANCE.

Church—Week-day Services—Skating Rink—Band of Music.—In an action by the churchwardens and trustees of a church, wherein week-day services were held, to restrain the playing of a band in an adjoining skating rink, which had the effect of disturbing the services:—

Held, that the use by the plaintiffs of the church in the way mentioned was an ordinary, reasonable and lawful use of their property, and the inconvenience to them and the congregation by the defendants' mode of using their property was such as to materially interfere with the use and enjoyment of the plaintiffs' property, and to constitute a nuisance.

Judgment of MEREDITH, J., affirmed, with a variation. *Churchwardens of the Church of St. Margaret in the City of Toronto et al. v. Stephens et al.*, 185.

OVERHOLDING TENANT.

See BANKRUPTCY AND INSOLVENCY, 2—LIMITATION OF ACTIONS, 1.

PARENT AND CHILD.

1. *Specific Performance—Agreement for Maintenance of Parent—Definite Contract—Evidence—Change of Parent's Intention—Improvements.*—When a child seeks to enforce an agreement that if he remains with a parent and works his farm and provides for his declining years the parent will bestow the farm on

him, the agreement must be established by the clearest evidence and a certain and definite contract for a valuable consideration proved. In the absence of such evidence the parent will be entitled to change his views and the disposition of the property. In this case the son who had made certain improvements on the property was held not to be entitled to a lien for them.

Judgment of ROSE, J., reversed. *Smith v. Smith*, 309.

2. *Custody of Infant—Rights of Father—Discretion of Court.*—Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the Court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the Court over the custody of infants, by R. S. O. ch. 168, sec. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.

In re Agar-Ellis (1878), 10 Ch. D. 49, 71, and *In re Newton*, [1896] 1 Ch. 740, specially referred to.

And where a wife, without any other reason than that she was tired of living in the country to which

her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the Court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times. *Re Mathieu*, 546.

See INFANTS.

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Action by Landlord—Necessity to Make Sub-tenants Parties.] — See EJECTMENT.

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PROMISSORY NOTES.

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PROSTITUTION.

Procuring Female for.]—See CRIMINAL LAW, 6.

PUBLIC SCHOOLS.

1. *Dissolution of Union School Section—Power of Arbitrators*—59 Vict. ch. 70, secs. 43, 44, 53, 54 (O.).]—Arbitrators appointed by a County Council under sec. 44 of the Public School Act, 1896, 59 Vict. ch. 70 (O.), awarded that a certain union school section, which comprised a rural section and an incorporated village, should be dissolved, and that all the lands included in the rural section "be attached to and form the same for school purposes," and that all the lands included in the village "shall remain attached to and form the urban section" of the said village for such purposes:—

Held, that though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation subject to the provisions of sections 53 and 54 of the Act, and the rural section as a non-union school section

subject to the provisions of sections 9 and 13 of the Act, and that the award was valid as an exercise of power under sub-section 5 or 6 of section 43.

Semble, the arbitrators would not have been justified in taking a portion of the territory outside the village and attaching it to the village. *In re Chesterville Public School Board*, 321.

2. *School Section—Appeal from Township to County Council*—"Divide"—R. S. O. ch. 292, sec. 39.]—Under R. S. O. ch. 292, sec. 39, there is no longer any appeal to the county council from the refusal of a township council to "divide" a school section. *In re School Section No. 16 Township of Hamilton*, 390.

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RAILWAYS.

1. *Passenger—Contract to Carry—Continuous Journey—Break in Railway—Omnibus Transfer—Demand of Fare—Refusal to Carry—Damages—Costs.*]—The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, via Galt and Berlin. There was a break in the line of the defen-

dants at Galt, the distance between the stations being three-fourths of a mile; an omnibus was provided, as advertised by the defendants, but the plaintiff was asked to pay a fare of ten cents for transfer in it, and, refusing to do so, was not permitted to be transported free. He failed to make his connection, and brought this action for damages :—

Held, that he was entitled to be conveyed from station to station free of expense; but it would have been reasonable for him to have paid the ten cents and made his connection, and the damages should be restricted to that sum.

Costs on the scale of the County Court, in which the action was brought, were allowed, as it was to test a right. *Clarry v. Grand Trunk R. W. Co.*, 18.

2. *Railway Crossings—Jurisdiction of Railway Committee—Constitutional Law—Intra Vires—Dominion Parliament—51 Vict. ch. 29 (D.), secs. 4, 306, 307—56 Vict. ch. 27 (D.).*—Sections 4, 306 and 307 of the Railway Act, 51 Vict. ch. 29 (D.), enacting that the plaintiffs and other railways, and any railways whatever crossing them, are works for the general advantage of Canada, and are to be subject thereafter to the legislative authority of Parliament, and 56 Vict. ch. 27 (D.), sec. 1, enacting that no railway shall be crossed by any electric railway whatever unless with the approval of the Railway Committee are *intra vires*, and therefore the Committee could empower the defendants' railway, contrary to the provisions of its Provincial Act of incorporation, to cross the plaintiffs' railway at grade, against the will of the latter. *The*

Grand Trunk R. W. Co. v. Hamilton Radial Electric R. W. Co., 143.

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REVENUE.

Succession Duty — Property in Another Province—Testator's Domicil — Surrogate Courts — Jurisdiction.]—The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal.

Where a deceased person had his domicil, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under \$100,000, although his whole estate, including property in the Province of his domicil, exceeds \$100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty.

Judgment of the Judge of the Surrogate Court of York affirmed. *Re Renfrew*, 565.

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RULES.

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Con. Rule 769.]—See INSURANCE, 7.

SALE OF LAND.

Vendor and Purchaser—Judgment for Balance of Purchase Money—Notice making Time the Essence—Right to Rescind—Forfeiture of Moneys Paid.]—A vendor who has recovered judgment against the purchaser for the balance of purchase money, due on a contract for the sale of land in which time is not of the essence of the contract, is not estopped by such judgment, from afterwards making time of the essence by notice terminating the contract within a reasonable time on non-payment of the balance due: *Cameron v. Bradbury* (1862), 9 Gr. 67, followed.

Moneys paid on a contract under such circumstances are forfeited to the vendor, who, however, is not at liberty to proceed on the judgment for the balance.

Howe v. Smith (1884), 27 Ch. D. 89; *Fraser v. Ryan* (1897), 24 A. R. 441, followed. *Gibbons v. Cozens*, 356.

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Services in Exchequer Court of Canada—Agreement with Client—Compensation en Bloc—Invalidity—Champerty—Account—Jurisdiction of Provincial Court—Ascertainment of Proper Compensation—Bill of Costs—Solicitors' Act, R.S.O. 1887 ch. 147—Quantum Meruit—Evidence.—The plaintiff, a suppliant in an action brought against the Crown, by its permission, in the Exchequer Court of Canada, made an agreement with the defendants, a firm of solicitors, that they should conduct her case to judgment, and, in consideration of their doing so at their own expense, that they should be entitled to retain to their own use one-fourth of the sum which should be recovered, and she assigned her claim to them as security for the performance of the agreement:—

Held, a champertous agreement, and not binding on the plaintiff.

Ball v. Warwick (1888), 50 L. J. N. S. C. L. 328, and *In re Attorneys*

and *Solicitors' Acts* (1875), 1 Ch. D. 573, followed.

2. Although the services of the defendants under the agreement were performed in a Dominion Court, a Provincial Court had jurisdiction to entertain an action for an account against the solicitors in respect of moneys received by them from the Crown in satisfaction of the claim.

3. The services performed by the defendants in the Exchequer Court were not performed as officers of the Courts of Ontario, and, with respect to such services and the remuneration therefor, the defendants were not subject to the Solicitors Act, R. S. O. 1887 ch. 147, and could not be compelled to deliver a bill of costs.

4. In the absence of a tariff of costs between solicitor and client in the Exchequer Court, the defendants were entitled to remuneration upon a *quantum meruit*, to be established by such evidence as would be appropriate in the forum of litigation.

Paradis v. Bossé (1892), 21 S.C.R. 419, and *Armour v. Kilmer* (1897), 28 O. R. 618, followed. *O'Connor v. Gemmill et al.*, 47.

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55 Vict. ch. 20, sec. 8 (O.).]—See WILL, 3.

55 Vict. ch. 42, secs. 413, 483, 531, subsec. 1 (O.).]—See MUNICIPAL CORPORATIONS, 1, 2, 11.

56 Vict. ch. 27 (D.).]—See RAILWAYS, 2.

56 Vict. ch. 31, sec. 5 (D.).]—See CRIMINAL LAW, 3.

56 Vict. ch. 35, sec. 10 (O.).]—See MUNICIPAL CORPORATIONS, 2.

57 Vict. ch. 23, sec. 18.]—See DIVISION COURTS, 1.

57 Vict. ch. 37, secs. 38-40.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

57 Vict. ch. 50, sec. 13 (O.).]—See MUNICIPAL CORPORATIONS, 1.

58 Vict. ch. 21 (O.).]—See DEVOLUTION OF ESTATES ACT, 1.

58 Vict. ch. 33, sec. 63 (D.).]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

59 Vict. ch. 21 (O.).]—See DEVOLUTION OF ESTATES ACT, 1.

59 Vict. ch. 51, sec. 20 (O.).]—See MUNICIPAL CORPORATIONS, 1.

59 Vict. ch. 70, secs. 9, 13, 43, subsecs. 5, 6, sec. 44, 53, 54.]—See PUBLIC SCHOOLS, 1.

60 Vict. ch. 36, secs. 148, 151, 159, 160 (O.).]—See INSURANCE, 1, 2, 5.

R. S. O. ch. 55, sec. 51.]—See COUNTY COURTS.

R. S. O. ch. 62, secs. 12, 35, 42.]—See ARBITRATION AND AWARD.

R. S. O. ch. 83, sec. 1.]—See CRIMINAL LAW, 8.

R. S. O. ch. 127, secs. 4, 5, 12.]—See DEVOLUTION OF ESTATES ACT, 1, 2—HUSBAND AND WIFE.

R. S. O. ch. 128, sec. 32.]—See WILL, 4.

R. S. O. ch. 129, sec. 16.]—See WILL, 5.

R. S. O. ch. 147, sec. 20.]—See BANKRUPTCY AND INSOLVENCY, 3.

R. S. O. ch. 148, sec. 18.]—See BILLS OF SALE AND CHATTEL MORTGAGE, 3.

R. S. O. ch. 136, secs. 86, 96.]—See MUNICIPAL CORPORATIONS, 10.

R. S. O. ch. 168, sec. 1.]—See INFANTS.

R. S. O. ch. 170, sec. 34.]—See LANDLORD AND TENANT, 3.

R. S. O. ch. 199.]—See WATER AND WATERCOURSES, 3, 5.

R. S. O. ch. 203, secs. 165, 168, sub-sec. 8, sec. 169, sub-sec. 19, secs. 171, 193.]—See INSURANCE, 3, 6, 7.

R. S. O. ch. 223, secs. 219, 227, 633.]—See MUNICIPAL CORPORATIONS, 7, 10.

STOCK.

Issued and Paid out.]—See COMPANY, 1.

STREAMS.

See WATER AND WATERCOURSES.

STREET RAILWAYS.

1. *Accident—Negligence—Infirm Persons.*]—It is the duty of a motor-man in charge of an electric car on a street railway to take special care to have the car sufficiently under control to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly evident and who may be crossing the line of railway at a street crossing. *Haight v. The Hamilton Street R. W. Co.*, 279.

2. *Foot-board on Side of Car—Invitation to Ride on—Improper Construction of Bridge—Negligence—Excessive Damages—New Trial.*]—On an electric car on defendants' railway, there was a step or foot-board running along the side of the car about a foot from the ground, leading to doors on each side of and at the centre and rear parts of the car, with a brass rail or rod about chest high running parallel with the foot-board for persons standing thereon to hold on by, and electric buttons on the side of the car to communicate with the conductor. The plaintiff seeing that the car was filling up rapidly, all the inside seats being occupied, and the rear platform crowded, jumped on the foot-board, the car then having started. A short distance from where the plaintiff got on was a bridge, which the car had to cross, the approach thereto being on a curve, by reason of which the plaintiff was swayed out from the car, and as it entered on the bridge he was struck by one of the side-posts of the bridge and thrown off and injured, the space between the post and the side of the car being only fourteen inches:—

Held, that an invitation to the plaintiff to stand on the foot-board, must be implied, and while there he was entitled to be carried safely, which the improper construction of the bridge prevented defendants doing, and which, therefore, constituted evidence of negligence.

A verdict for the plaintiff was sustained, except as to the damages, \$3,300, which were held to be excessive, and a new trial was directed unless the plaintiff consented to their being reduced to \$2,000.

The elements in assessing damages in cases of this kind considered. *Fraser v. London Street R. W. Co.*, 411.

SUCCESSION DUTY.

See REVENUE.

SUNDAY.

Sale of Liquors.—*See* INTOXICATING LIQUORS, 1.

Treating on.—*See* INTOXICATING LIQUORS, 1.

SURROGATE COURTS.

See REVENUE.

TELEPHONE.

See MUNICIPAL CORPORATIONS, 8.

TENANT.

For Life.—*See* WASTE.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

See LIMITATION OF ACTIONS, 1.

TIME.

Essence of Contract.—*See* SALE OF LAND.

For Payment of Amount of Award.—*See* INSURANCE, 2—WATER AND WATERCOURSES, 5.

See CRIMINAL LAW, 5—INSURANCE, 7—LANDLORD AND TENANT, 4.

TITLE.

Adverse.—*See* LIMITATION OF ACTIONS.

TRADE.

Contract in Restraint of.—*See* COVENANT.

False Description.—*See* CRIMINAL LAW, 7.

TRADE UNIONS.

Expulsion of Member — Fine — Deprivation of Benefits — Action — Bar—R. S. C. ch. 131, sec. 4—*Libel — Privilege.*—An action by a member of a trade union, having a monetary interest in its funds, against certain of his fellow-members for unlawfully imposing a fine upon him, and expelling him in default of payment, and depriving him of benefits, is within the prohibition of sec. 4 of the Act respecting Trades Unions, R. S. C. ch. 131, providing that the Court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members.

Rigby v. Connol (1880), 14 Ch. D. 428, followed.

The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by

the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed :—

Held, that the publication was not privileged.

On appeal to the Divisional Court the Court held that the evidence did not support the finding that the defendants knew that the words complained of were untrue, nor was there evidence of malice, and that in the absence thereof the communication was privileged, and the appeal was allowed. *Beaulieu v. Cochrane et al.*, 151, 598.

TREES.

Sale of by Locatee.]—See CROWN LANDS.

TRUSTS AND TRUSTEES.

1. *Estate—Temperance Society—Locality—New Societies.*]—A grantor, by deed, conveyed certain land to three trustees in trust for certain societies at a named place and their successors, representatives of the aforesaid societies, or the representatives of the said societies (*sic*) of any temperance society by whatever name it or they might be known or designated. Together with all * * of the estate, right, title * * of the grantor, his heirs or assigns, *habendum*, unto the said trustees and their successors in trust for said societies, or such of them as may continue to exist. * *

The three temperance societies mentioned in the deed had all ceased to exist for many years :—

Held, that the trustees took only a life estate for their joint lives and the life of the survivor of them,

leaving the reversion in fee in the grantor :—

Held, also, looking at the situation of the premises and the uses for which they were intended, and that the temperance societies originally named were all formed in a certain place, that although the trust was intended to be confined to temperance societies having the same local habitation, the words in the *habendum* were large enough to include any temperance society founded at that place while any of the original grantees were living :—

Held, also, that the plaintiff having been appointed a trustee for such a society, although no such appointment could extend or prolong the life estate granted, was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises, which he had commenced to do. *Armstrong et al. v. Harrison*, 174.

2. *Power Coupled with Trust—Discretion of Trustees—Liability for Breach.*]—Where a power is coupled with a trust or duty, the Court will enforce the proper exercise of the power, although it will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it.

Lands were devised to trustees upon trust, in their discretion to sell, as soon as they might deem it proper to do so, for the most money that could reasonably be obtained therefor; and by a later clause, it was declared that the trustees were not to be answerable for the exercise or non-exercise of the powers therein contained, or as to the manner or exercise thereof, but were to have an absolute discretion as to the same :—

Held, that the power of sale was coupled with a trust to sell for the most money, and that the trustees were answerable for a proper exercise of the power, the powers of the Court being in no way affected by the clause exonerating the trustees, which related merely to the time and manner of exercising the trust. *Clark v. Keefer*, 557.

Security Taken in Name of Trustee—Affidavit of Bona Fides.—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 1.

See **WILL**, 5.

ULTRA VIRES.

See **MUNICIPAL CORPORATIONS**, 9.

VENDOR AND PURCHASER.

See **CROWN LANDS—INSURANCE**, 4.
—**SALE OF LAND—WILL**, 1.

VERDIOT.

Reversal of.—See **COUNTY COURTS**.

WAIVER.

See **BENEVOLENT SOCIETIES—INSURANCE**, 1.

WARRANT.

Of Commitment.—See **CONSTABLE**.

WASTE.

Permissive Waste—Growth of Weeds—Tenant for Life—*R. S. O. ch. 202.*—An action for permissive waste will not lie against a tenant for life.

In re Cartwright (1889), 41 Ch. D. 532, followed.

The spread of noxious weeds from natural causes, or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, and the failure to stop the growth thereof, is no evidence of waste, but only of ill-husbandry; and the fact that there is a statute, *R. S. O. ch. 202*, for the prevention of the spread of noxious weeds does not make any difference. *Patterson v. The Central Canada Loan and Savings Co.*, 134.

WATER AND WATERCOURSES.

1. *Riparian Owners—Soil of Stream—Dams*—*R. S. O. (1887) ch. 120, sec. 1*—"Other Obstruction."—The words "any other obstruction" in sec. 1 of *R. S. O. (1887) ch. 120*, mean obstruction of a like kind as "felling trees," etc., previously mentioned in the section, and do not comprehend the erection of a dam across a stream by the owner of the land on each side of the stream and of the river bed. *Farquharson v. The Imperial Oil Co.*, 206.

2. *Navigation—Carriage of Ice—Right to Cut Passage Through Harbour.*—The cutting of a channel through ice formed on a water lot in a navigable harbour, to enable ice cut outside to be conveyed to the shore of the harbour, is a use of the water lot for the purposes of navigation; and the owner of the water lot,

the grant of which was subject to the rights of navigation, cannot interfere with such user. *McDonald v. The Lake Simcoe Ice and Cold Storage Co.*, 247.

3. *Waterworks Companies—Municipal Corporation—Arbitration to Determine Value—Notice to Mortgagees—Value of Works—Interest.*—The omission to serve notice on the mortgagees of a waterworks company, of arbitration proceedings under R. S. O. (1887) ch. 164, to determine the amount, to be paid by a municipality for such works and property, the mortgagees not being parties thereto, and in which the award made was less than the amount of their claim, does not entitle the company to have such award referred back, and the mortgagees made parties, as their rights could not be affected thereby.

In such an arbitration the arbitrators are simply to value the existing property of the company at the sum it would cost to erect the works and purchase the property, allowing for wear and tear, and perhaps for outlay of a necessary experimental character, but they are not to make any allowance for future profits or for the taking away from the company the right to supply water at a profit.

Interest is allowable on outlay during the construction of the works, but not on the cost of construction after completion, and while the annual revenue of the company is less than the annual expenditure. *In re the Corporation of the Town of Cornwall and The Cornwall Waterworks Co.*, 350.

4. *Waterworks—Supply of Water—Statutory Obligation—Breach of Contract.*—In actions by consumers of water against a municipal corporation

for not providing a proper supply of pure water for the plaintiffs' elevators according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevators:—

Held, that there was no right of action in the plaintiffs by reason of any statutory obligation on the part of the defendants.

That, on the evidence, there was no contract between the plaintiffs and the defendants by which the latter were bound to supply the former with water free from sand.

The relation was rather that of licensor and licensee than one founded upon contract. *Scottish Ontario and Manitoba Land Co. v. City of Toronto. Defoe v. City of Toronto*, 459.

5. *Waterworks—Municipal Corporations—R. S. O. ch. 199—Award Fixing Amount to be Paid for Property—Passing of By-law to Raise Amount—Right of Corporation to Possession—Mortgagees.*—Upon the making of an award fixing the amount to be paid for waterworks in an arbitration under R. S. O. ch. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the amount of the award, the corporation are entitled, under sec. 62, to the possession of the property; and, therefore, no action will lie against them to recover the possession so acquired, nor against their agent duly appointed to take possession.

The six months provided for by sec. 64, within which the amount must be paid or the company be entitled to resume possession, must have elapsed before action brought to recover possession by the company. It is not sufficient that that

period should have elapsed at the time the action is tried.

Mortgagees of a waterworks company, who are not parties to the arbitration, and who have taken no part in the taking of possession, are not necessary parties to an action by the waterworks company to recover possession. *The Cornwall Waterworks Co. v. The Corporation of the Town of Cornwall et al.*, 605.

WATERWORKS.

See WATER AND WATERCOURSES, 3, 4, 5.

WAY.

1. *Easement—Way of Necessity—Physical Inaccessibility—Convenience.*—A way of necessity is founded on necessity, not on convenience, and the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

The defendants in an action for trespass to land set up that a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they claimed that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of utilization without an unreasonable expenditure of money, and not suffi-

cient for the reasonable purposes of the owner of the lands:—

Held, that the defendants were not entitled to the right claimed by them.

Dictum of Lord Mansfield in *Morris v. Edgington* (1810), 3 Taunt. at p. 31, and of Bowen, L. J., in *Bayley v. Great Western R. W. Co.* (1884), 26 Ch. D. at p. 453, referred to. *Fitchett v. Mellow et al.*, 6.

2. *Right of—Prescription—Termini—Slight Deviations—Interruptions.*—The *termini a quo* and *ad quem* of a way over the defendant's land used and enjoyed as of right by the plaintiff and his predecessors in title for upwards of twenty years before the commencement of the action had not varied during that period, except at two points, where, about fourteen years before action, one of the plaintiff's predecessors slightly altered the line of the way for the purpose of going round muddy spots, and the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way:—

Held, that they did not operate to do away with the plaintiff's right to claim the way between the termini, that way having been substantially used during the whole period; but the plaintiff should be confined either to the original or substituted line.

Slight temporary interruptions by the defendant were insufficient to prevent the statute from running. *Warren v. VanNorman*, 84.

3. *Right of—Prescription—Termini—Slight Deviations—Interruptions—Appeal—Admission of New Evidence—Erection of Gate Across Way.*—The decision of STREET, J., 29 O. R. 84, affirmed on appeal.

The plaintiff, having omitted to give formal proof of his title at the trial, was allowed to supply it upon the appeal.

Upon the plaintiff's assent, the judgment below was varied by awarding to the defendant leave to erect and maintain a gate across the end of the way in question.

Clendenan v. Blatchford (1888), 15 O. R. 285, followed. *Warren v. VanNorman*, 508.

See MUNICIPAL CORPORATIONS, 1, 3, 4, 5, 6, 8—NEGLIGENCE.

WEEKLY COURT.

See COSTS.

WIDOW.

Charge on Estate.—See DEVOLUTION OF ESTATES ACT, 1.

Election.—See DEVOLUTION OF ESTATES ACT, 2.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. *Devise of Real Estate—Payment of Legacy out of Annual Produce—Charge—Purchase Money—Indemnity.*—A testator, after a bequest of a legacy to the plaintiff, amongst others, devised to a daughter "my two farms," describing them, and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered. The daughter took possession of the

whole estate, paid the debts and received the rents and profits of the farms which she subsequently mortgaged, and they were sold by the first mortgagee, under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee:—

Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the farms, and that the charge was not affected by the subsequent words, "or" as to the executors "should seem best"; that the fact that sufficient annual produce of the farms had been received which, if set apart, would have paid off the legacy was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her possession and receipt, and her grantees or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed until payment of the legacy with interest not exceeding six years' arrears, that the balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that subject thereto the subsequent mortgagee was entitled to it.

Decision of ROBERTSON, J., varied. *Callaghan v. Howell*, 329.

2. *Devise to Executors—Grant of Probate to One of Two Executors—Right of Executor to Sell Land.*—A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the in-

come thereof to the husband during his life-time, and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—

Held, that he had power to make a valid sale, and that the devise being to the executors, section 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power.

Re Koch v. Wideman (1894), 25 O. R. 262, followed. *In re Hewett v. Jermyn*, 383.

3. *Construction of—Gift to Charities—Validity—Legacies—Deduction of Legacy Duty—“Protestant Charitable Institutions.”*—In an action for construction of a will:—

Held, that the gift of the residue of a mixed fund to the executors to be distributed “among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they * * may deem proper,” was a valid gift, having regard especially to sec. 8 of 55 Vict. ch. 20, R. S. O. ch. 112, the provision in force at the time of the testator’s death in 1895.

Held, also, that the legacy duty was to be deducted from the legacies, and the executors had no discretion to pay such duty out of the residue.

Kennedy v. Protestant Orphans’ Home (1894), 25 O. R. 235, followed.

Held, also, that the House of Refuge for the poor of a county was not within the terms of the residuary gift. The word “Protestant,” as used in the will, was referable as

well to the objects of the charitable institutions as to their government; and “Protestant charitable institutions” were such charitable institutions as were managed and controlled exclusively by Protestants and were designed for the bestowal of charity upon Protestants alone. *Manning et al. v. Robinson et al.*, 483.

4. *Estate Tail—Dying Without Issue—R. S. O. ch. 128, sec. 32—Construction of.*—Section 32 of the R. S. O. ch. 128, is to be construed strictly, and is confined to cases in which the word “issue,” or some word of precisely the same legal import, is used; and does not extend to cases in which the word “heirs” is used.

Where a testator devised to his grandson, his heirs and assigns forever, certain land with the qualification that in case of his “dying without leaving any lawful heirs by him begotten” the land was to go to other persons named, the section was held not to apply, and that the grandson took an estate tail. *Re Brown and Campbell*, 402.

5. *Executors and Administrators—Devise—Power to Mortgage—Payment of Debts—Trustee Act—Devolution of Estates Act.*—The testatrix, after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain for his own use for life, and directed that, after his decease, his executors or administrators should sell the land and divide the proceeds among her children:—

Held, that this was a devise of the farm out and out as to the legal estate—the words “and his executors and administrators” being equi-

valent to "heirs and assigns;" the executor had the right by virtue of sec. 16 of the Trustee Act, R. S. O. ch. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by sec. 19.

In re Bailey (1879), 12 Ch. D. 268, and *In re Tanqueray-Willauve and Landau* (1882), 20 Ch. D. at p. 476, followed.

The Devolution of Estates Act, R.S.O. ch. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer v. Neff et al.*, 680.

Appointment by.] — See INSURANCE, 1, 5.

WINDING-UP.

See COMPANY, 1—INSURANCE, 7.

WRIT.

Service of.]—See JURISDICTION.

WORDS.

"Advancement."]—See ADVANCEMENT.

*"Arrears of Rent Due * * for Three Months following the Execution of such Assignment."*]—See LANDLORD AND TENANT, 3.

"Co-insurance."] — See INSURANCE, 6.

"Connected in Any Way."]—See COVENANT.

"Disposing."] — See LANDLORD AND TENANT, 1.

"Divide."]—See PUBLIC SCHOOLS, 2.

"Effectual in Law."]—See MUNICIPAL CORPORATIONS, 10.

"Executors and Administrators."]—See WILL, 5.

"Felling Trees."]—See WATER AND WATERCOURSES, 1.

"Fixed Dates."]—See INSURANCE, 7.

"Heirs."]—See WILL, 4.

"Injuriousely Affected."] — See MUNICIPAL CORPORATIONS, 11.

"Instrument Capable of Registration"—*"Instrument."*]—See MUNICIPAL CORPORATIONS, 10.

"Issue."]—See WILL, 4.

"Lien."]—See EXECUTION.

"Money Charged on Land."]—See EXECUTION.

"Not Just and Reasonable."]—See INSURANCE, 6.

"Ordinary Beneficiary."]—See INSURANCE, 1.

"Other Disposal."]—See INTOXICATING LIQUORS, 1.

"Other Obstruction."]—See WATER AND WATERCOURSES, 1.

"Profits."]—See LIMITATION OF ACTIONS, 2.

"Proceeding."]—See EXECUTION.

"Protestant"—*"Protestant Charitable Institutions."*]—See WILL, 3.

"Repair."]—See MUNICIPAL CORPORATIONS, 3.

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